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A TREATISE

ON THE

LAW OF MORTGAGES.

EIGHTH EDITION.

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COOTE'S

TREATISE ON THE

LAW OF MORTGAGES.

EIGHTH EDITION

BY

SYDNEY EDWARD WILLIAMS,

OF LINCOLN'S INN, BARRISTER-AT-LAW,

Author of "The Law relating to Legal Representatives," &c.

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PREFACE

TO THE EIGHTH EDITION.

The present Edition has been brought down to September, 1912, and includes the cases reported for that month, and also all Statutes and Rules bearing on the subject prior to that date. The Work has, however, not merely been brought up to date, but the old matter has been carefully revised and corrected. The Index also has been revised and improved.

Since the publication of the last Edition there have been many important alterations in the law both statutory and judicial. This has, of course, involved a large amount of new matter in the present Edition, but it has been found possible, by omitting old matter of little or no practical value, to make the necessary additions without increasing the bulk of the Work.

The Editor's warmest thanks are due to Mr. E. A. Wurtzburg, of Lincoln's Inn, who has most kindly read through the proofs and made many valuable suggestions.

S. E. W.

4, New Square, Lincoln's Inn.
September, 1912.

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A TREATISE

ON THE

LAW OF MORTGAGES.

Part I.

OF DIFFERENT KINDS OF MORTGAGES, AND OF INSTRUMENTS AND MATTERS ANCILLARY THERETO.

CHAPTER I.

OF MORTGAGES AT COMMON LAW.

Distinction between *vivum vadium* and *mortuum vadium.*

i.—Vivum vadium.—The common law recognised two kinds of landed security, viz., *vivum vadium* and *mortuum vadium.* The *vivum vadium* and also the *mortuum vadium* (according to Glanville), as at first known, were determinable or base fees, with a right of reverter in the feoffor and his heirs, on the payment of a given sum. The *mortuum vadium,* or mortgage ultimately known at the common law, was an absolute fee, with a condition annexed, making void the feoffment on payment of a given sum, which the common law allowed, if reserved to the feoffor or his heirs. The difference between the estates was striking. In the first instance the creditor took an estate, which, as soon as his debt was satisfied, *ipso facto* ceased, and the feoffor might re-enter and maintain ejectment; in the latter instance the feoffee took the whole estate, subject to be defeated, but which, on the non-fulfilment of a certain engagement, became his own by an indefeasible title. In the first case the defeasibility was an inherent quality of the estate; in the other case the determination was collateral to it.

Nature and effect of *vivum vadium.*

The *vivum vadium* consisted of a feoffment to the creditor and his heirs, until out of the rents and profits he had satisfied himself his debt; the creditor took actual possession of the estate, and received the rents, and applied them from time to time in liquidation of the debt. When it was satisfied, the debtor might, as before observed, re-enter and maintain ejectment; and it is said to have been called *vivum vadium* because neither debt nor estate was lost.

Analogy between ancient common law mortgages and Welsh mortgage.

This mode of security was probably never general; it is ill adapted to the purpose of a security, the object of which is the repayment of the loan in one entire sum at a given time, and not a repayment by small instalments, which in fact is eating out the debt piecemeal; and it seems now to have entirely ceased. A security in land, bearing a remote resemblance to the *vivum vadium*, may be considered as subsisting under the appellation of Welsh mortgage; but there is this distinction between the securities, viz., that in the *vivum vadium* the rents were applied in satisfaction of the principal, and in Welsh mortgages they are received in satisfaction of the interest, while the principal remains undiminished. In one respect they agree —the estate is never forfeited. The Welsh mortgage seems in fact more closely to resemble the ancient *mortuum vadium* (*a*).

Original form of *mortuum vadium.*

ii.—Mortuum vadium.—The *mortuum vadium*, or mortgage, is mentioned by Littleton, Coke, and others, as so called because on breach of condition the estate was rendered indefeasible in the mortgagee, and absolutely lost to the mortgagor. In this light it is placed by Lord Coke, in contradistinction to the *vivum vadium*, and such seems to be the opinion generally adopted. But Glanville gives a different meaning to the origin of the term. He says, "Mortuum vadium dicitur illud cujus fructus vel redditus interim percepti in nullo se acquierant;" and applies it to the before-mentioned species of usury at common law, viz., a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, and until which he received the rents without account, so that the estate was unprofitable or dead to the mortgagor in the meantime; and the exposition given by Glanville seems the more sound, as it was rendered at a very early period of our history, while as yet the fetters on alienation were unremoved. We may there-

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(*a*) See *post*, p. 31.

fore consider the *vivum vadium* to have implied a security, by which the rents of land were from time to time applied in reduction of the principal of the debt; and the *mortuum vadium* to have originally implied a security, by which, until payment of a given sum, the rents of land were *ad interim* lost to the owner, and received by the creditor and unaccounted for, so that the debt remained undiminished, which was at common law, as before remarked, in the event of the creditor dying possessed of the pledge, punishable as usury; and it must be observed, there was the like advantage, in one respect, to the debtor in this form of mortgage, as in the *vivum vadium*, viz., that the estate was never lost.

Modern form of *mortuum vadium.*

There is no trace of the period when this mode of mortgage fell into disuse. In its stead arose the *mortuum vadium*, or mortgage, afterwards so well known at common law, and thus described by Littleton (*b*): "Item; if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c., forty pounds of money, that then the feoffor may re-enter, &c. In this case the feoffee is called tenant in mortgage, which is as much as to say in French, *come mortgage*, and in Latin, *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay, at the day limited, such sum or not; and if he doth not pay, then the land, which is put in pledge upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, &c.; and if he doth pay the money, then the pledge is dead as to the tenant, &c."

Estate on condition.

It is somewhat singular that Littleton should not refer to the explanation of the term as rendered by Glanville; and we may conclude that the original *mortuum vadium* had by this time totally fallen into disuse and become obsolete. The mortgage described by Littleton was strictly an estate upon condition, that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment, or in a deed of defeasance executed *at the same time* (for the common law does not allow a feoffment to be defeasanced by matter subsequent), by which it was provided, that on payment by the mortgagor or feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him

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(*b*) Sect. 332.

Chap. I. (ii.)

the legal estate instantly vested, subject to the condition (*c*). If the condition was performed, the feoffor re-entered and was in of his old estate, paramount to all the charges and incumbrances of the feoffee, whether in the *Per* or in the *Post* (*d*), or in other words, above all persons, whether claiming through the feoffee, as heir, widow, or purchaser, or paramount, or collaterally to the feoffee, as the lord by escheat and the husband by curtesy. If the condition was broken, the feoffee's estate was absolute and his estate was indefeasible, and all the legal consequences followed as though he had been absolute owner from the time of the feoffment. But until breach of condition, possession was not in general given, which was a further distinction between this mode of mortgage and the *vivum vadium* and old *mortuum vadium*. In order to protect the mortgagor from the eviction of the mortgagee, to which he was become liable, a proviso was inserted, declaring that, until breach of condition, the mortgagor might hold the estate; and on the other hand, the mortgagor engaged that in such event he would do all lawful acts for further assurance.

Enforcement of conditions at common law.

Although the common law did not favour conditions, but required strict performance of them (*e*), yet it was in certain cases satisfied with the performance of the intent of the condition (*f*), though not performed in words; and although a difference was taken (*g*) between conditions to preserve and conditions to destroy an estate, the former being allowed to be performed as near the condition as could be, and the latter being *strictissimi juris*, yet conditions in mortgages, the performance of which, in fact, destroyed the estate of the mortgagee, were favoured in the eye of the law, and rather considered as belonging to the class of conditions for preserving estates.

Forfeiture on default of mortgagor.

Thus mortgages stood at common law, and it is difficult to conceive, if the Courts of law had been so inclined (which it does not seem they were), on what principle they could have proceeded in giving the debtor relief. The forfeiture was com-

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(*c*) In 5 Bac. Abr., Mortgage, it is stated that "the mortgagor before forfeiture, and whilst it remains uncertain whether he will perform the condition at the time limited or not, hath the legal estate in him." This is a mistake; the legal estate instantly vests in the mortgagee, subject to be defeated on performance of the condition by the mortgagor.

(*d*) Co. Lit. 239, a.

(*e*) *Ibid.* 205, a.

(*f*) Shep. Touchst. by Prest. 139, 143.

(*g*) Co. Lit. 206, a.

plete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy short of an actual legislative enactment, without disturbing the settled land-marks of property.

Equitable jurisdiction.

A jurisdiction was, however, arising, under which the harshness of the common law might be softened without an actual interference with its principles, and a system established at once consistent with the security of the creditor, and a due regard for the interests of the debtor.

Reconveyance necessary of mortgage in ordinary form.

It may under this head be lastly remarked, that at the present day, if the condition, instead of determining the estate of the mortgagee, be, that on payment, &c., the mortgagee shall reconvey or re-assign the estate, there, notwithstanding the performance of the condition by payment within the appointed time, an actual reconveyance or re-assignment will be necessary, which must be in such a form as to pass the legal estate (*h*).

(*h*) *Re Ethel and Mitchell*, (1901) 1 Ch. 945.

CHAPTER II.

OF THE NATURE AND INCIDENTS OF A MORTGAGE SECURITY.

Term "mortgage" defined.

i.—Definition of Mortgage.—A mortgage, in the modern acceptation of the term, is a security created by contract for the payment of a debt already due or to become due, or of a present or future advance, effected by means of an actual or executory conveyance of real or personal property, charging the mortgaged property with the payment of the money secured, redeemable at law only according to the strict legal conditions of the conveyance, but redeemable in equity independently of such conditions, and enforceable, in default of payment, by foreclosure or sale in lieu thereof (*a*).

A mortgage on land is an immoveable, so that it is not affected by domicil (*b*).

A charge on real or personal property may arise by operation of law, or may be effected by contract.

Charges by contract to secure a debt or loan may be effected by means of mortgage, pledge, or hypothecation.

Charges by operation of law distinguished from mortgages.

According to the above definition, a mortgage arises out of contract between a debtor and a creditor for the payment of a debt or loan; and herein it is distinguished from a charge arising by operation of law, either under a judgment or charging order made by a Court of competent jurisdiction, or by way of lien as incident to contracts in which the parties stand in a relation to each other other than that of debtor and creditor by virtue of the mortgage contract itself, as, *e.g.*, vendor and purchaser, solicitor and client, and factor and principal.

Charges under settlements and wills.

The definition excludes charges created by deed of settlement, or by testamentary disposition, as in the case of a jointure or portion secured by a term and also charges of debts or legacies

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(*a*) In Ireland, and in many of the Colonies, mortgages are generally enforceable by sale instead of foreclosure; and the English Courts have power in a foreclosure action to decree a sale. See *post*, Chap. XXXVIII., Sect. III.

(*b*) *Re Hoyles*, (1911) 1 Ch. 179.

created by will or codicil. Such charges give no right of foreclosure (*c*).

Securities for performance and observance of obligations.

Mortgages are also distinguished by the above definition from powers of distress or entry given to secure the performance or observance of obligations other than the repayment of a debt or loan, such as the execution of works, or the payment of rents, or the keeping of conditions and covenants in leases, &c.

Distinction between mortgage and pledge.

The term "mortgage" has frequently been defined as a pledge (*d*), and it is apparently derived from the Latin words "*mortuum vadium*," or dead pledge. But, even as regards real estate, and such personalty as is capable of complete transfer without actual or constructive delivery, it seems necessary, to the completeness of the definition, to indicate that the so-called pledge must be made by means of a legal or equitable conveyance or assurance of the property. And, as regards personal chattels, the use of the word "pledge" seems to overlook important distinctions between a mortgage where the title passes to the mortgagee by virtue of a bill of sale, though without delivery, and a pledge (strictly so called) where a qualified property passes by actual or constructive delivery of the chattels (*e*).

Hypothecation distinguished from mortgage and pledge.

The repayment of a debt or loan may be secured by hypothecation, or equitable assignment of choses in action or goods to which the debtor or borrower is entitled, but which are owing by or in the hands of third persons. Such hypothecation amounts to an appropriation of the specific fund or chattels, and may be effected either by agreement between the parties, or by an order on the holder of the fund or chattels (*f*). An hypothecation differs from a mortgage in that there is no actual or executory conveyance or assurance of the property appropriated for payment of the debt or loan, and from a pledge in that there is no actual or constructive delivery of the property.

Difference between civil law and the

ii.—Assurance of Property by Mortgage.—The transfer of property by way of mortgage is, according to English common

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(*c*) See *Sampson* v. *Pattison*, 1 Ha. 533, 535; *Jenkin* v. *Row*, 5 De G. & S. 107; *Re Owen*, (1894) 3 Ch. 220.

(*d*) See Co. Lit. 205, a; Com. Dig. tit. *Mortgage*, A.; Dav. Conv. 3rd ed. vol. ii. p. 2. See also *Galton* v. *Hancock* 2 Atk. 435; *Harrold* v. *Plenty*, (1901) 2 Ch. 314.

(*e*) See further as to the distinction between mortgages and pledges, *post*, Chap. LXIII.

(*f*) See *post*, Chap. LXIV.

Chap. II. (ii.)

common law of England as to mortgages.

law, to be regarded less as akin to the Roman *pignus* or *hypotheca* than as a conveyance on common law condition (*g*). By the civil law, the debt secured was regarded as the principal, and the security was merely an incident. When the debt was discharged, the security was extinguished, and, in case of default, until sentence was pronounced giving possession to the creditor, the ownership of the debtor was not displaced (*h*). But, according to the common law of England, immediately upon the execution of a mortgage, the property vests in the mortgagee, subject to a condition for redemption and defeasance on payment of principal and interest on a specified day (*i*). If the money is paid on that day, the condition is performed, and the mortgagor is entitled, like any other grantor of an estate conditioned upon his performance thereof, to re-enter and hold the property as of his former estate. If, however, the money is not paid on the very day, then, at law, the property becomes vested in the mortgagee absolutely, and discharged from the condition. The strictness of the legal conception of a mortgage has been, as will be seen hereafter (*k*), materially modified by the doctrine of redemption introduced by the Court of Chancery.

Legal and equitable mortgage.

A mortgage may be effected by means of a legal or an equitable assurance. By a legal mortgage, the legal estate in the property is conveyed to the mortgagee, subject to the mortgagor's right to redeem at law, on the day specified, and, in equity, at any time until foreclosure or sale. An equitable mortgage does not pass the legal estate to the creditor, but operates by way of equitable or executory assignment or transfer. Such charges are usually effected either by mortgages in the ordinary form of property already in mortgage, or by instruments charging without expressly purporting to convey property, or by express or implied agreements to give a legal mortgage.

Equitable charge.

As will be seen hereafter, an instrument charging without expressly conveying property may give to the creditor a right to call for a legal mortgage (*l*).

(*g*) See Butler's note, Co. Lit. 205, a.

(*h*) Bac. Abr. tit. *Mortgage*, A.

(*i*) In modern times a proviso for reconveyance has been substituted for the old condition of defeasance. See *post*, p. 135.

(*k*) See *post*, p. 11.

(*l*) *Post*, pp. 62 *et seq.*

Agreement to give legal mortgage enforceable in equity.

Equity will specifically enforce the performance of an agreement to give a legal mortgage as a security for a subsisting debt or an actual advance, and until such mortgage is given, will treat the agreement as an executory assurance, equivalent to an actual assurance so far as the equitable rights and remedies of the parties are concerned (*m*).

Agreement for mortgage implied.

The agreement for an assurance by way of mortgage may be in express terms, evidenced by deed or other writing; or it may be raised by implication, as in the case of an equitable mortgage by mere deposit of deeds or documents without any agreement in writing (*n*).

What property may be mortgaged.

It may be laid down as a general proposition, with few exceptions, that every species of property, real or personal, corporeal or incorporeal, moveable or immoveable, in possession, remainder, expectancy, or even in action, may be the subject of mortgage. Manors, lands and tenements, freehold, copyhold, and leasehold; remainders or reversions, rents, franchises, advowsons, rectories impropriate, tithes, bills of lading, ships, freightage, articles of merchandise, bills of exchange, debts, government annuities, title deeds, and even possibilities, may, according to their several natures, be conveyed, transferred, delivered, or assigned, by way of mortgage security.

iii.—Mortgage creates a Charge on the Mortgaged Property.—The effect of a mortgage is to charge the moneys secured upon the mortgaged property and to make it answerable for the repayment of such moneys.

Covenant for personal payment.

It is, indeed, usual to insert in mortgage deeds covenants by the mortgagor to repay the principal sum secured on a specified day, and to pay interest thereon in the meanwhile, and also thereafter, until the principal is repaid. The effect of these covenants is to create a personal contract between the mortgagor and mortgagee for payment of the money, and to render the mortgagee to whom they are given a specialty creditor, but such covenants are not a necessary part of the mortgage security (*o*). Notwithstanding a judicial dictum to the contrary (*p*), it is clear that a mortgage does not of itself imply a covenant.

(*m*) *Post*, p. 62.

(*n*) *Carter* v. *Wake*, 4 Ch. D. 606; *Harrold* v. *Plenty*, (1901) 2 Ch. 314. And see *post*, Chap. VII.

(*o*) See *Economic Life Ass. Soc.* v. *Usborne*, (1902) A. C. 147, per Lord Davey. See *Howatson* v. *Webb*, (1908) 1 Ch. 1.

(*p*) See *Galton* v. *Hancock*, 2 Atk. 435.

A mortgage, if secured by covenant or bond (*q*), is a debt of specialty, although the money so secured be not actually paid to the mortgagor, but consist of a sum which the mortgagor has previously covenanted to pay to the mortgagees as trustees of a voluntary settlement, and which sum such trustees have agreed to lend him on that security (*r*).

Mortgage debt, when simple contract.

If a mortgage does not contain any covenant for payment, nor is accompanied by a collateral bond, the debt is a simple contract debt, even though secured by a charge on land (*s*). In such a case, the fact of the advance being made at the request of the mortgagor, raises a contract by parol, which is not merged in the mortgage as a security of a higher nature, and the mortgage will be considered as a collateral security, and therefore, before the Judicature Act, an action of debt or of assumpsit lay (*t*). So in equity, " Every mortgage implies a loan; every loan a debt; and though there were no covenant or bond, the personal estate of the borrower must remain liable to pay off the mortgage " (*u*).

When a covenant for personal payment will be implied.

A mere charge on land does not, generally speaking, imply a covenant for payment (*x*). But a provision in a mortgage deed, that the money is to be repaid on a certain day, imports a covenant for repayment on that day (*y*).

If a debtor for a collateral purpose executes a deed by which he admits the debt, even though he conveys property to a trustee upon trust to sell and pay the debt out of the proceeds, that will not raise an implied covenant to pay, where the acknowledgment appears to have been made solely for a collateral purpose; though, as a general rule, such a covenant will be implied from an unequivocal acknowledgment in a deed of such a liability (*z*).

Recital of debt.

A deed reciting a simple contract debt, and agreeing to

(*q*) Bonds were formerly often taken as a collateral security for the repayment of mortgage moneys, but the practice has become obsolete.

(*r*) *Tanner* v. *Byne*, 1 Sim. 160.

(*s*) *Barnes* v. *Glenton*, (1899) 1 Q. B. 885. See *Firth* v. *Slingsby*, 58 L. T. 483.

(*t*) *Allenby* v. *Dalton*, 5 L. J. K. B. 312; *Hodges* v. *Croydon Canal Co.*, 3 Beav. 86.

(*u*) Per Lord Talbot in *King* v. *King*, 3 P. Wms. 358. And see *Ancaster* v. *Mayer*, 1 Bro. C. C. 454, 464; *Quarrell* v. *Beckford*, 1 Madd. 278.

(*x*) See *Preston* v. *Great Yarmouth*, L. R. 7 Ch. 655.

(*y*) *Hart* v. *Eastern Union Rail. Co.*, 7 Exch. 246; 8 Exch. 116. See *Sutton* v. *Sutton*, 22 Ch. D. 511, 516, C. A.

(*z*) *Courtney* v. *Taylor*, 6 Man. & Gr. 851. See *Marryat* v. *Marryat*, 28 Beav. 224; *Isaacson* v. *Harwood*, L. R. 3 Ch. 225; *Kidd* v. *Boone*, L. R. 12 Eq. 89. See as to the effect of such an acknowledgment on the Statute of Limitations, *post*, Chap. XLVIII., Sect. I. (v).

execute a further security with all incidental or usual covenants, constitutes a covenant (*a*); a mere recital of a debt will not be sufficient (*b*).

No covenant in Welsh mortgages, &c.

A covenant for payment is not usually inserted in a Welsh mortgage; nor is such a covenant inserted in a mortgage of copyholds by actual surrender, though the mortgagor is usually required to execute a collateral deed containing such a covenant, and also any other covenants necessary for maintaining the security, or otherwise incident to the terms of the contract (*c*).

Exclusion of personal liability for mortgage debt.

Personal liability, express or implied, is not, however, necessarily incident to a mortgage. A charge by way of mortgage upon property may be so framed as to exclude all personal liability of the mortgagor. A mortgage of a term for the purpose of raising money for portions usually imposes no personal liability upon the borrowing trustees of the term; and, though a covenant by the tenant for life to keep down the interest is usually inserted in the mortgage deed, such a covenant is collateral and merely ancillary to, but not an essential part of the mortgage security (*d*). The absence of a covenant for payment in no way affects the mortgagor's right of redemption (*e*). On the other hand, a mortgagor who is made liable on his covenant has an implied right of indemnity against the assignee of the equity of redemption; but a surety for the mortgagor has no such right (*f*).

Principles of civil law followed in equity.

iv.—Right of Redemption essential to Mortgage.—The right of redemption is an essential and inseparable attribute of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself (*g*).

The absolute forfeiture of the estate at common law, on breach of the condition, was, in the eye of equity, an injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. The Courts of Equity, founded on the principles of the civil law, gradually succeeded,

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(*a*) *Saunders* v. *Milsome*, L. R. 2 Eq. 573.

(*b*) *Jackson* v. *North Eastern Rail. Co.*, 7 Ch. D. 573. See *Iven* v. *Elwes*, 3 Drew. 25.

(*c*) See *Lawley* v. *Hooper*, 3 Atk. 278, at p. 280. And see *post*, p. 32.

(*d*) See *Floyer* v. *Lavington*, 1 P. Wms. 268; *Mellor* v. *Lees*, 2 Atk. 494, 496; *Economic Life Ass. Soc.* v. *Usborne*, (1902) A. C. 147, per Lord Davey.

(*e*) See *infra*, p. 14.

(*f*) *Re Law Courts Chambers Co.*, 61 L. T. 669.

(*g*) (1902) A. C. 24, per Lord Macnaghten.

by an introduction of those principles, in moderating the severity with which the common law followed the breach of the condition.

Rule in equity as to right of redemption.

Though they could not alter the legal effect of the forfeiture at common law, they operated on the conscience of the mortgagee, and, acting *in personam*, they declared it unreasonable that he should retain for his own benefit what was intended as a mere security; and they adjudged that the breach of the condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest and costs, notwithstanding the forfeiture at law.

Conflict between Courts of common law and equity.

The judges of common law strenuously opposed the introduction of this novelty; and though ultimately defeated by the increasing power of equity, they nevertheless in their own Courts still adhered to the rigid doctrine of forfeiture, and consequently the law of mortgage fell almost entirely within the jurisdiction of equity, with the result that, as the Courts of Equity became established in power, the doctrine of the equity of redemption became fully recognised (*h*).

No restrictions on right to redeem allowed.

It was a necessary corollary to the establishment of this doctrine to lay down the rule that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from the right to redeem, as is expressed in the well-known maxim, "Once a mortgage always a mortgage, and nothing but a mortgage."

"Once a mortgage always a mortgage."

It is as firmly settled now as it ever was in former times that equity will not permit any device or contrivance, designed or calculated to prevent or impede redemption (*i*). The maxim, however, needs perhaps at the present day some qualifying explanation. When the usury laws were in force, and every device for evading them had to be defeated, the maxim was convenient and as free from objection as most concise statements are; for every stipulation in a mortgage in favour of a mortgagee, and conferring pecuniary benefits on him in addition to repayment of principal, lawful interest, and costs, was open to

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(*h*) See *Langford* v. *Barnard*, Tothill, 134, temp. Eliz.; *Emanuel College* v. *Evans*, 1 Rep. in Ch. 10, temp. Car. I.

(*i*) *Noakes* v. *Rice*, (1902) A. C. 24, per Lord Macnaghten; *Fairclough* v. *Swan Brewery*, 81 L. J. P. C. 207.

the objection that it was a cloak for usury. But now that the usury laws are abolished such language is much too wide (*k*).

Agreements fettering redemption void.

It is therefore a well-established rule that equity will control even an express agreement of the parties, and will let a man loose from his agreement, and, even against his agreement, admit him to redeem a mortgage (*l*); and that whatever clause or covenant there may be in a conveyance, yet if upon the whole it appear to have been the intention of the parties that such conveyance shall only be a mortgage, or pass an estate redeemable, the Court will always construe it so, and reject any stipulation seeking to negative or fetter the right of redemption (*m*).

Restriction within limited time.

It was held under the old law that no condition could be valid which purported to restrict the right of redemption within a limited period, as the life of the mortgagor (*n*). But it is clear that a mortgage may be made irredeemable for a *reasonable* period, as, for instance, for five or seven years (*o*); "it is an old and well-established practice, and a reasonable practice too" (*p*). But it is otherwise where the period is unreasonable (*q*). Therefore a proviso restraining redemption for so long a period as twenty-eight years is always unreasonable and void, at least where there is no corresponding restriction preventing the mortgagee from calling in his money (*r*).

In like manner a second mortgagee may be precluded until a certain period from redeeming the first mortgage and getting in the legal estate (*s*).

Restriction of right to redeem to particular class of persons.

Nor did the attempt better succeed to confine the right of redemption to a particular heir or class of heirs. Thus, where a mortgage deed contained a proviso for redemption by the mortgagor or the heirs male of his body, and a covenant by the mortgagor that no one but himself or the heirs of his body should be admitted to redeem, the jointress was allowed to

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(*k*) *Bradley* v. *Carritt*, (1903) A. C. 253, per Lord Lindley.

(*l*) *Howard* v. *Harris*, 1 Vern. 192; and see *East India Company* v. *Atkyns*, Comyns, 349, where *arguendo* it is said, equity will relieve, even if the mortgagor take his oath not to redeem: *Salt* v. *Northampton (Marquis)*, (1892) A.C. 1.

(*m*) 5 Bac. Abr. 5; *Seton* v. *Slade*, 7 Ves. 265, 273.

(*n*) *Newcomb* v. *Bonham*, 1 Vern. 7; reversed on special grounds. See *post*, p. 23; *Kilvington* v. *Gardiner*, cited 1 Vern. 192; *Salt* v. *Northampton*, *sup.* And see *Spurgeon* v. *Collier*, 1 Ed. 55; *Jason* v. *Eyre*, 2 Ch. Ca. 33; *Price* v. *Perrie*, 2 Freem. 258; *Goodman* v. *Grierson*, 2 Ba. & Be. 278.

(*o*) *Teevan* v. *Smith*, 20 C. D. 724, 729; *Biggs* v. *Hoddinott*, (1898) 2 Ch. 307. See *Williams* v. *Morgan*, (1906) 1 Ch. 804.

(*p*) *Bradley* v. *Carritt*, (1903) A. C. 253, per Lord Macnaghten.

(*q*) *Cowdry* v. *Day*, 1 Giff. 316; *Fairclough* v. *Swan Brewery*, *supra*.

(*r*) *Morgan* v. *Jeffreys*, (1910) 1 Ch. 620.

(*s*) *Ramsbottom* v. *Wallis*, 5 L. J. Ch. 92.

redeem, though circumstances were adduced to explain and support the proviso and covenant (*t*).

Covenant for repayment does not affect right to redeem.

It is clear, notwithstanding a dictum to the contrary in the case last referred to, that the absence of a covenant for repayment of the money, or of a collateral bond, cannot affect the right to redeem; for though these are collateral securities (as has been seen) creating a personal obligation on the mortgagor, yet independently of them every loan implies a debt, and the right to redeem proceeds on the principle that a creditor shall not obtain advantage by his security beyond his principal, interest and costs. The bond or covenant may tend to explain a transaction and show the intention of the parties in a doubtful case to create a mortgage; it may be good matter of evidence; but neither of them is a necessary ingredient in the creation of a mortgage; for, to apply the remedy, equity only requires to be satisfied that the conveyance was originally intended as a security for the payment of a sum of money, whatever form the security may take (*u*).

Right of foreclosure an essential element of a mortgage.

v.—**Mortgage enforceable by Foreclosure.**—In strictness, where there is no right of foreclosure, there is no mortgage. Where, upon a deed of grant of lands subject to a limited power of redemption, the question was, whether the deed was to be construed as a mortgage, or as a conditional sale (*x*), the rule was thus expressed by Lord Manners—"The fair criterion, by which the Court is to decide whether this deed be a mortgage or not, I apprehend to be this, are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to?" (*y*).

Securities not importing right of foreclosure.

So, where an estate was conveyed to a person in trust that the same should stand charged with a principal sum and interest, with a power of sale, it was held that this was not a mortgage entitling the grantee to foreclosure (*z*). So, a trust to pay out of rents and profits is not strictly a mortgage, as there is no right of foreclosure (*a*); nor, for the same reason, is an equit-

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(*t*) *Howard* v. *Harris*, 1 Vern. 33, 190. See *Floyer* v. *Lavington*, 1 P. Wms. 271; *Mellor* v. *Lees*, 2 Atk. 494, 496.

(*u*) See *King* v. *King*, 3 P. Wms. 360; *Mellor* v. *Lees*, 2 Atk. 494, 495.

(*x*) As to the difference between conditional sales and mortgages, see *post*, p. 23.

(*y*) *Goodman* v. *Grierson*, 2 Ba. & Be. 274, at p. 279.

(*z*) *Sampson* v. *Pattison*, 1 Ha. 533. See *Jenkin* v. *Row*, 5 De G. & Sm. 107; *Schweitzer* v. *Mayhew*, 31 Beav. 37.

(*a*) *Taylor* v. *Emerson*, 4 Dr. & War. 117. See *Slade* v. *Rigg*, 3 Ha. 35;

able charge created by will upon a reversionary interest in land (*b*).

Mortgage in form of trust for sale.

So an instrument in the form of a trust for sale in case of non-payment of the debt at a certain time is in effect a mortgage and redeemable by the grantor, but the remedy of the mortgagee is under the trust for sale and not by foreclosure as in the case of an ordinary mortgage (*c*).

But the Court will presume an instrument intended as a security to be an ordinary mortgage entitling the mortgagee to foreclose, unless the terms exclude such construction (*d*). So the deposit of a certificate of shares by way of security amounts to an equitable mortgage entitling the mortgagee to foreclosure (*e*).

Mortgage of uncalled capital of company.

In a recent case (*f*), where foreclosure was claimed in respect of a mortgage of uncalled capital of a company, the claim was allowed, although it had never previously been made in respect of property of the kind in question, apparently upon the ground that every mortgage imports a right of foreclosure, irrespective of the nature of the property comprised in the security.

Principle of the rules.

That foreclosure is essential to a legal mortgage is evident, if the strict terms of the mortgage contract and the grounds on which equity interferes to mitigate the strictness of that contract are considered. By such a mortgage the property is conveyed to the mortgagee subject to a condition for redemption or reconveyance if the money is paid on a specified day; on default in payment, the conveyance becomes at law, and according to the strict terms of the contract, absolute, and, but for the interference of equity, would operate as a foreclosure. In order to moderate the severity and consequent hardship incident to a strict enforcement of the contract, equity has interfered to prevent it from having its full effect, and when the ground of interference is gone by the non-payment of the debt, equity simply removes the stop it has itself put on, or, in other words,

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Bell v. *Carter*, 17 Beav. 11. Such incumbrances, however, have other incidents of a mortgage, as, for instance, the right of redemption: *Schweitzer* v. *Mayhew*, 31 Beav. 37; *Wicks* v. *Scrivens*, 1 J. & H. 215, 218; *Pearce* v. *Morris*, L. R. 5 Ch. 230. And, accordingly, they are sometimes, in a popular sense, included by conveyancers under the term "mortgages."

(*b*) *Re Owen*, (1894) 3 Ch. 223.

(*c*) *Locking* v. *Parker*, L. R. 8 Ch. 30; *Re Alison*, 11 Ch. D. 284; *The Metropolis, &c. Bldg. Soc.*, (1911) 1 Ch. 698.

(*d*) *Balfe* v. *Lord*, 2 Dr. & War. 480.

(*e*) *Harrold* v. *Plenty*, (1901) 2 Ch. 314.

(*f*) *Sadler* v. *Worley*, (1894), 2 Ch. 170; *Re Continental Oxygen Co.*, (1897) 1 Ch. 511.

decrees foreclosure (*g*). And the same principle has been applied by the Courts of Equity with respect to equitable mortgages. The result appears to be that the mortgagee is entitled to foreclosure (subject to the jurisdiction to order a sale in lieu of foreclosure (*h*)) in all cases where, but for the interference of equity, foreclosure would, in effect, have followed *ex contractu;* so that foreclosure is a necessary incident of every transaction which the Court treats as a mortgage as distinguished from a pledge (*i*).

Mortgagee entitled only to principal, interest, and costs.

vi.—Collateral Advantage cannot be obtained.—It is a well-established rule in equity that a mortgagee will not be allowed, as such, to avail himself of the necessities of his debtor so as to obtain a collateral or additional advantage beyond the payment of principal, interest, and costs. The principle underlying the decisions is that a creditor shall not be allowed to have interest for his money and an advantage besides for the loan of it, so as to "clog the redemption." The rule, as stated by Lord Hardwicke, is that, if any fetter is laid upon redeeming the mortgaged estate by some original agreement, either in the mortgage deed or a separate deed, it will not avail, where it is done with a design to wrest the estate out of the hands of the mortgagor (*k*).

Agreement in mortgage for purchase of equity of redemption.

Accordingly, equity will not allow the mortgagee to enter into a contract with the mortgagor, *at the time of the loan,* for the absolute purchase of the lands for a specific sum, in case of default made in payment of the mortgage-money at the appointed time, justly considering that it would throw open a wide door to oppression, and enable the creditor to drive an inequitable and hard bargain with the debtor, who is rarely prepared to discharge his debt at the specific time (*l*).

Agreement that policy effected on loan shall be property of mortgagee.

So, where an insurance society advanced a sum of 10,000*l.* on a reversionary interest of the mortgagor contingent on his surviving his father, and by a separate instrument the mortgagor agreed that a policy of life assurance which was effected

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(*g*) See per Jessel, M.R., in *Carter* v. *Wake*, 4 Ch. D. at p. 606.

(*h*) This jurisdiction will be considered later. See *post*, Chap. XLIX.

(*i*) *Harrold* v. *Plenty*, (1901) 2 Ch. 314. The exception in the case of a Welsh mortgage, which depends on the different nature of the contract, will be considered hereafter. See *post*, p. 32.

(*k*) *Mellor* v. *Lees*, 2 Atk. 494, 495.

(*l*) *Price* v. *Perrie*, 2 Freem. 258; *Willett* v. *Winnell*, 1 Vern. 488; *Bowen* v. *Edwards*, 1 Rep. in Ch. 221; *Re Edwards*, 11 Ir. Ch. R. 367.

as part of the loan transaction should in certain events belong absolutely to the trustees of the society, it was held that, in accordance with the equitable doctrine against fettering the right of redemption, the mortgagor was, notwithstanding the agreement, entitled to the policy moneys after payment of the moneys secured by the mortgage (*m*).

Result of recent decisions.

Notwithstanding the recent decisions of the House of Lords, and having regard to the diversity of opinion in *Bradley* v. *Carritt*, it cannot be said that the principles relating to collateral advantage are perfectly clear, still less are they easy of application; and it seems that it is and must always be in each case a question whether the particular advantage is valid or not. There are, however, some points which may be regarded as settled. It is clear that a collateral advantage will be valid if there is no unfair advantage taken by the mortgagee, and provided that it does not clog or fetter the equity of redemption (*n*). It seems also clear that a collateral advantage will be valid if it arise out of an entirely separate transaction from the mortgage (*o*). On the other hand, it is equally clear that equity will not permit any device or contrivance, designed or calculated, to prevent or impede redemption; and this is so, though the mortgagee retains no hold upon the property direct or indirect (*p*). It seems also clear that no collateral stipulation which is part and parcel of the mortgage transaction can extend beyond redemption (*q*); but it does not seem quite clear whether a collateral stipulation which takes effect before redemption is necessarily good (*r*).

Perhaps the best statement of the principle in a brief and general way is that the property which comes back to the mortgagor must not be impaired or worse than it was when it was mortgaged. The property itself, and the owner of the property in the use and enjoyment of it, must be as free and unfettered as if the property had never been mortgaged (*s*). And it seems, according to a recent authority, that the property is impaired even if it comes back enveloped in an atmosphere

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(*m*) *Salt* v. *Marquess of Northampton*, (1892) A. C. 1. See *post*, p. 308.

(*n*) *Noakes* v. *Rice*, (1902) A. C. 24, 33.

(*o*) *Reeve* v. *Lisle*, (1902) A. C. 461; *De Beers Mines* v. *British S. A. Co.*, (1912) A. C. 52. See also *Santley* v. *Wilde*, (1899) 2 Ch. 474; *Maxwell* v. *Tipping*, (1903) 1 Ir. R. 498.

(*p*) *Bradley* v. *Carritt*, (1903) A. C. 253.

(*q*) *Ibid.*

(*r*) *Lisle* v. *Reeve*, (1902) 1 Ch. 53, C. A., dissenting from Buckley, J.; and see (1902) 2 Ch. p. 486.

(*s*) *Noakes* v. *Rice*, *sup.*

of danger, and in a state requiring delicate handling and cautious treatment to prevent its becoming a source of danger to its owner (*t*).

Companies.

The rule prohibiting the clogging of the equity of redemption under a mortgage by an individual applies equally to a mortgage by a limited company (*u*). But *quære* whether the rule applies to debentures secured by a floating charge (*x*).

Foreign land.

The same principle applies to foreign land, and forbids the enforcement of a stipulation which in equity is void, though the property is outside the jurisdiction. Wherever the property is situated it is equally inequitable for the mortgagee to seek to retain an interest in the property after the loan has been repaid, and so long as he is amenable to the jurisdiction he will be prevented from so doing (*y*).

Bonus or commission.

The question whether a bonus or commission is a clog on the equity will be dealt with later (*z*), but it may here be stated that a bonus or commission will be valid if properly stipulated for and if it has become payable before redemption (*a*), but not otherwise (*b*).

Stipulations restricting use of the property.

The most important class of cases in which the question whether a collateral advantage is a clog on the equity has been recently considered is where some covenant or stipulation has been entered into by the mortgagor restricting his right to the enjoyment or disposal of the mortgaged property. And it seems to be now established that such a stipulation can only be valid during the continuance of the security, and will be void on redemption.

Accordingly where a mortgage of a public-house to a brewer provided that the loan should continue for a period of five years, and contained a covenant that the mortgagor should not during the continuance of the security sell on the premises beer other than that supplied by the mortgagee, the covenant was held to be valid (*c*). This decision has been frequently approved, especially in *Noakes* v. *Rice* (*d*), where a similar covenant

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(*t*) *Bradley* v. *Carritt*, *sup.*

(*u*) *Jarrah Timber, &c. Corp.* v. *Samuel*, (1904) A. C. 323.

(*x*) *De Beers Mines* v. *British S. A. Co.*, (1912) A. C. 52.

(*y*) *British South Africa Co.* v. *De Beers Mines*, (1910) 2 Ch. 502.

(*z*) *Post*, Chap. LIV., Sect. II. (ii).

(*a*) *Potter* v. *Edwards*, 26 L. J. Ch. 468; *Eyre* v. *Mackenzie*, (1894) 1 Ch. at p. 227; *Bradley* v. *Carritt*, (1903) A. C. 253; *post*, Chap. LIV., s. 2 (ii.).

(*b*) *Browne* v. *Ryan*, (1901) 2 Ir. R. 653.

(*c*) *Biggs* v. *Hoddinott*, (1898) 2 Ch. 307, C. A.

(*d*) (1902) A. C. 24.

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which extended beyond the continuance of the security was held to be invalid (*e*).

The case of *Santley* v. *Wilde* (*f*) has been thought to be inconsistent with the above principle, and has been disapproved by the House of Lords (*g*), but the true view of that case may be that there were there two separate transactions, and that the case if wrongly decided was decided, not on a wrong principle, but upon the wrong application of a sound principle (*h*).

In an Irish case (*i*), which has been approved by the House of Lords (*g*), where a farmer mortgaged his holding, and as part of the mortgage transaction stipulated that he would sell his holding within twelve months, employ the mortgagee as auctioneer at a certain commission, and pay him a like commission if the conduct of the sale was given to anyone else, it was held that the stipulation had no effect after redemption.

In the recent case of *Bradley* v. *Carritt* (*k*), in which the principle seems to have been carried farther than in any other case, the House of Lords (Lord Shand and Lord Lindley dissenting) held that a stipulation in a mortgage of shares that the mortgagor would use his best endeavours to secure that the mortgagee should always thereafter be employed as broker for the company was invalid. It will thus be seen that a collateral stipulation will be invalid not only when it is a clog on the equity of redemption, or on the mortgaged property, but also when it in any way fetters the mortgagor in the free enjoyment of his property.

Option of purchase.

Another class of cases of collateral advantage which are generally invalid is where the mortgagor agrees, as part of the mortgage transaction, to sell the equity of redemption to the mortgagee, or to give him an option of purchase within a limited period.

Accordingly the mortgagee will not be allowed to enter into a contract with the mortgagor, at the time of the loan, for the absolute purchase of the property for a specific sum in case of default in payment of the mortgage debt at the appointed time (*l*).

(*e*) See *Morgan* v. *Jeffreys*, (1910) 1 Ch. 620.

(*f*) (1899) 2 Ch. 474.

(*g*) *Noakes* v. *Rice*, *sup.*

(*h*) *Bradley* v. *Carritt*, (1903) A. C. 253, per Lord Lindley.

(*i*) *Browne* v. *Ryan*, *sup.* See *Maxwell* v. *Tipping*, (1903) 1 Ir. R. 498.

(*k*) (1903) A. C. 253.

(*l*) *Price* v. *Perrie*, 2 Freem. 258; *Willett* v. *Winnell*, 1 Vern. 488; *Re Edwards*, 11 Ir. Ch. R. 367. See *Tasburgh* v. *Echlin*, 2 Bro. P. C. 265.

So where the mortgagor covenanted that he would, on being required to do so, convey to the mortgagee ground rents, being part of the mortgaged property, of the value of the mortgage debt, at twenty years' purchase, the covenant was held invalid (*m*).

So a stipulation in a mortgage of debenture stock, that the mortgagee was to have the option to purchase the whole or any part of such stock at 40 per cent. at any time within twelve months, was held void as being a clog on the equity of redemption (*n*).

Right of pre-emption.

But care must be taken to distinguish between the last-mentioned rule and a case with which it may be confounded, viz., an agreement by the mortgagor, in case of sale, to give the mortgagee a preference of pre-emption, which, if claimed within a reasonable time, will be enforced (*o*). And although at first view this may seem to be within the objection raised by equity, viz., that of giving the creditor a collateral advantage over and above his principal and interest, yet on closer inspection it will be found clear of the rule. The option of sale is still left with the mortgagor; he may redeem or sell, nor is he tied down to price; all that is stipulated for is, that if he thinks fit to sell, he shall give the mortgagee the refusal (*p*). Rights of pre-emption, however, are construed strictly (*q*).

Subsequent agreement for purchase of equity of redemption valid.

The rule will not be extended so as to forbid an option of purchase given to the mortgagee, not as part of the mortgage transaction, but by a subsequent and independent transaction (*r*), nor to an agreement for the purchase of the equity of redemption, entered into *bonâ fide* and consequently to a mortgage which was made and concluded without reference to any such agreement, though followed by a subsequent agreement between the parties, that the mortgagor might have the estate on payment of principal, interest, and costs (*s*); nor will the rule apply to the case of a release of the equity of redemption, with a collateral agreement to reconvey on repayment of the purchase-money (*t*).

(*m*) *Jennings* v. *Ward*, 2 Vern. 520.

(*n*) *Jarrah Timber, &c. Corp.* v. *Samuel*, (1904) A. C. 323.

(*o*) *Orby* v. *Trigg*, 9 Mod. 2; *Re Edwards*, 11 Ir. Ch. R. 367. See *Dawson* v. *Dawson*, 8 Sim. 346; *Cookson* v. *Cookson*, 8 Sim. 529.

(*p*) *Bowen* v. *Edwards*, 1 Rep. in Ch. 221.

(*q*) See cases cited *supra*, n. (*l*), and *Re Edwards*, 11 Ir. Eq. R. 367.

(*r*) *Reeve* v. *Lisle*, (1902) A. C. 461.

(*s*) *Cotterell* v. *Purchase*, Ca. t. Talb. (Williams) 61. See *Waters* v. *Groom*, 11 Cl. & F. 684.

(*t*) *Ensworth* v. *Griffith*, 15 Vin. Ab.

Sale to mortgagee.

A sale or release to the mortgagee of the equity of redemption will be valid if it is a fair transaction, and if it is subsequent to and independent of the mortgage transaction (*u*). And the same may perhaps be said of a lease from the mortgagor to the mortgagee (*x*). In neither case will the transaction be void as a collateral advantage, but in both cases it will be invalid if oppressive or unfair.

Abandonment of agreement

An agreement for the release of the equity of redemption to the mortgagee not acted on for many years was, under the circumstances, treated as abandoned (*y*). And in one case, where the mortgagee took a conveyance of the equity of redemption, but allowed the mortgagor to continue in possession for a considerable period, it was held that the mortgagor might redeem (*z*).

Inadequacy of price immaterial.

Mere inadequacy of price is no ground for setting aside a purchase of the equity of redemption made by the mortgagee in consideration of the mortgage debt, since when no money is advanced at the time of the agreement, no advantage could be taken of the debtor's distress (*a*). So where the transaction was fair, though the full value was not given, the agreement was enforced (*b*).

Executor of mortgagee of term purchasing fee.

It may be here incidentally remarked that, if the executor of a mortgagee of a term of years purchases the equity of redemption in fee for a small sum in his own name and for his own benefit, he will be considered a trustee for the benefit of his testator's estate (*c*).

Effect of fraud.

A sale or release to a mortgagee of the equity of redemption will be supported, unless there is fraud or pressure (*d*). The onus of proving fraud or misrepresentation rests on the party seeking to impeach the deed (*e*). The right to set the release aside may be purchased from the mortgagor or his assignee (*e*).

468, pl. 8; *Gossip* v. *Wright*, 9 Jur. N. S. 592; *Lincoln* v. *Wright*, 4 De G. & J. 16. See also *Perry* v. *Marston*, 2 Bro. C. C. 397; *Barrell* v. *Sabine*, 1 Vern. 268.

(*u*) *Prees* v. *Coke*, L. R. 6 Ch. 645; *Melbourne Banking Co.* v. *Brougham*, 7 App. Ca. 307; *Reeve* v. *Lisle*, *sup.*; *Kevan* v. *Joyce* (1896), 1 Ir. R. 442.

(*x*) *Infra.*

(*y*) *Rushbrook* v. *Lawrence*, L. R. 5 Ch. 3.

(*z*) *Harris* v. *Horwell*, Gilb. Eq. Rep. 11.

(*a*) *Purdie* v. *Millet*, Taml. 28.

(*b*) *Chambers* v. *Waters*, 11 Cl. & F. 684.

(*c*) *Fosbrooke* v. *Balguy*, 1 My. & K. 226.

(*d*) *Ford* v. *Olden*, L. R. 3 Eq. 461. See *Knight* v. *Majoribanks*, 2 Mac. & G. 10; *Purdie* v. *Millet*, Taml. 28. And see *Massey* v. *Johnson*, 1 Exch. 241; *Barton* v. *Bank of New South Wales*, 15 App. Ca. 379, P. C.

(*e*) *Melbourne Banking Co.* v. *Brougham*, 7 App. Ca. 307.

Lease by mortgagor to mortgagee.

Where there are circumstances of oppression and fraud, a lease from the mortgagor to the mortgagee would, of course, be set aside (*f*); and it would seem that such a lease for a long term of years (as 999 years), at a rent no higher than would be reserved on a common occupation lease if the rent were a fair rent, would be set aside even without circumstances of oppression or fraud, on the principle that the parties were not on equal terms, and that such a lease was in effect parting with the inheritance (*g*); in fact, any lease from a mortgagor to a mortgagee will be looked at with suspicion, especially if the latter obtains any advantage beyond his interest (*h*). A lease, however, for twenty-one years, at a fair occupation rent, was supported (*i*); and a lease will not be set aside because the value has changed in the lapse of years (*k*). Where a mortgagee took a lease from the mortgagor subsequent to a *puisne* mortgage, he was treated as a mortgagee in possession, but no objection was raised to the lease (*l*). Leases in the nature of a Welsh mortgage stand on a different footing (*m*).

Restrictions on mortgagee to prevent clogging equity of redemption.

The Courts, fearful of opening a door to oppression and fraud, have imposed numerous other restrictions on the mortgagee so as to prevent him from clogging the equity of redemption, as, for instance, that he shall not be permitted, as a general rule, to make any charge by way of bonus or commission in consideration of the advance (*n*); nor to stipulate for interest at an increased rate on default (*o*), or for compound interest (*p*); nor to make any charge for his personal trouble (*q*); nor appoint himself the receiver (*r*); for he is entitled to no benefit beyond his principal, interest, and costs, and any increased remuneration for the loan which he has validly stipulated for (*s*).

Exception to general rules of equity in cases of family arrangements.

The preceding authorities show with what jealousy equity has looked on every attempt made to counteract or oppose its interference in behalf of the mortgagor; but its object being to protect him at a time when his necessities may have placed him at the mercy of the mortgagee, *cessante causâ cessat etiam lex;* and therefore the general rules of equity before stated will admit of a very considerable exception in cases in which there

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(*f*) *Gubbins* v. *Creed*, 2 Sch. & L. 214.

(*g*) *Webb* v. *Rorke*, 2 Sch. & L. 661.

(*h*) *Hickes* v. *Cooke*, 4 Dow. 24, 25.

(*i*) *Morony* v. *O'Dea*, 1 Ba. & Be. 109.

(*k*) *Hickes* v. *Cooke*, 4 Dow. 24, 25.

(*l*) *Gregg* v. *Arnott*, Ll. & G. t. Sug. 246.

(*m*) See *post*, p. 31.

(*n*) See *post*, Chap. LIV., Sect. II.

(*o*) See *post*, p. 136.

(*p*) See *post*, pp. 139 *et seq*.

(*q*) See *post*, Chap. LIV., Sect. V.

(*r*) See *post*, Chap. LIV., Sect. IV.

(*s*) *Noakes* v. *Rice*, (1902) A. C. 24.

is evidence of intention in the nature of the transaction that provision was intended to be made by the mortgagor for some branch of his family, or that the mortgage was intended by him in the nature of a family settlement (*t*). Thus, where the right to redeem was confined to the mortgagor during his life only, but there was an express covenant that the mortgagor might redeem at any time during his life, so that the mortgagee could not have compelled the mortgagor to redeem, and it was proved that the mortgagor had a kindness for the mortgagee, his near relative, and intended him to have the land, and that the restriction of redemption was inserted only for a particular reason, it was held (*u*) that redemption after the death of the mortgagor must be refused. The like doctrine governed a case (*x*) in which a man, by settlement on his marriage, reserved to himself the option of paying a sum of money, or letting the settlement stand (*y*). In *Jason* v. *Eyre* (*z*) redemption was decreed, although it might have been fairly regarded as coming within the same exception, on the ground of the transaction being intended by way of settlement or family provision; but in that case parol evidence of the mortgagor's intention was rejected, which at the present day would be clearly admissible (*a*).

What are defeasible purchases.

vii.—Distinction between Defeasible or Conditional Purchase and Mortgage.—There is all the difference in the world between a mortgage and a sale with a right of repurchase, but if the transaction is completed by redemption or repurchase there is no difference in the actual result (*b*).

In the latter case there is no question as to collateral advantage, but the vendors will be strictly kept to their contracts, which are regarded as defeasible or conditional purchases, creating only a right of repurchase in accordance with the condition, and not as imposing such a right of redemption as in the case of a mortgage (*c*).

(*t*) *Gossip* v. *Wright*, 32 L. J. Ch. 648, approved 71 L. J. Ch. 52, per Cozens-Hardy, L. J.

(*u*) *Bonham* v. *Newcomb*, 1 Vern. 231; reversing *Newcomb* v. *Bonham*, 1 Vern. 7.

(*x*) *King* v. *Bromley*, 2 Eq. Ca. Abr. 595.

(*y*) And see *Wolston* v. *Aston*, Hard. 511; *Hampton* v. *Spencer*, 2 Vern. 288.

(*z*) 2 Ch. Ca. 33.

(*a*) *Richards* v. *Syms*, 2 Eq. Ca. Abr. 617. See *infra*, p. 28.

(*b*) Per Lord Macnaghten, 13 A. C. 567, and see (1891) 1 Q. B. at p. 25.

(*c*) *Bunning* v. *Bunning*, 1 L. J. Ch. 56; *Beckett* v. *Tower Assets Co.*, (1891) 1 Q. B. 1, 25. And see *Coveney* v. *Persse*, (1910) 1 Ir. R. 194.

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Agreement for lease on default of repayment of loan.

So, where a certain sum had been lent without security, and an agreement was entered into that if the money so lent, together with certain further advances, were not repaid by a specified day, the lease of a farm should be assigned to the lender without any further consideration; it was held that the relation of vendor and purchaser, and not that of mortgagor and mortgagee, was constituted by the agreement (*d*).

Absolute conveyance with subsequent agreement for repurchase.

So, also, where an equity of redemption was absolutely conveyed, and subsequently it was agreed between the parties that, if the vendor should desire it, he might have the estate back on payment of the purchase-money with interest and costs, the transaction was held to be a sale and not a mortgage (*e*).

Agreement for conveyance to third person defeasible on payment by purchaser.

Where the purchase-money of an estate was paid by a third person on behalf of the purchaser, and a further sum also advanced, and it was agreed that the estate should be conveyed to such third person, and that, if the purchaser repaid the sums with interest by a future day, then the agreement was to be void, and if not, then the sale was thereby confirmed absolutely to the other party; it was held that the agreement constituted a conditional purchase (*f*).

Conditions strictly enforced.

The right of repurchase is a privilege, and is only to be exercised upon a strict performance of the terms (*g*), unless the terms are waived (*h*); otherwise the grantee's estate will become absolute (*i*).

Time for repurchase of essence of contract.

Where the mortgagor released to the mortgagee his equity of redemption, and the mortgagee granted him a lease for ninety-nine years determinable on lives at a rent, with a proviso that, if he paid the rent regularly, he might redeem within five years, and in default the agreement was to be void; it was held that the privilege of redemption was lost on non-payment of the rent at the periods fixed for that purpose (*k*).

Exception where amount not settled.

But, where a time is fixed for the repurchase, and the terms depend on the result of an account which has not been rendered by the other party, a reconveyance will be decreed (*l*).

(*d*) *Tapply* v. *Sheather*, 8 Jur. N. S. 1163.

(*e*) *Cotterell* v. *Purchase*, Cas. t. Talb. (Williams) 61. See *Neal* v. *Morris*, Best, 597; *Brooke* v. *Garrod*, 2 De G. & J. 62; *Ward* v. *Wolverhampton Waterworks Co.*, L. R. 13 Eq. 243.

(*f*) *Perry* v. *Meddowcroft*, 4 Beav. 197, affirmed, 10 Beav. 141.

(*g*) *Gossip* v. *Wright*, 9 Jur. N. S. 592; *Joy* v. *Birch*, 4 Cl. & F. 58.

(*h*) *Pegg* v. *Wisden*, 16 Beav. 239.

(*i*) *Floyer* v. *Lavington*, 1 P. Wms. 268; *Mellor* v. *Lees*, 2 Atk. 494.

(*k*) *Davis* v. *Thomas*, 1 R. & My. 506. And see *Joy* v. *Birch*, 10 Bli. N. S. 241; *Williams* v. *Owen*, 5 My. & Cr. 303; *St. John* v. *Wareham*, cited 3 Swanst. 631.

(*l*) *Ponsford* v. *Hankey*, 9 W. R. 353.

Transaction must be purchase or mortgage as regards both parties.

It is not always easy to discriminate between a mortgage and a sale qualified by a power to repurchase (*m*). In determining questions of this nature, it must be borne in mind that a mortgage cannot be a mortgage on one side only; it must be mutual (*n*); that is, if it be a mortgage with one party, it must be a mortgage with both. But the rule only requires that it shall not be competent to one party alone to consider it a mortgage. In other respects the rights of the parties may be different, for it happens not unfrequently, that one party may not be able to foreclose at a time when the other may redeem (*o*).

Agreement for repurchase not acted on.

So, in *Williams* v. *Owen* (*p*), it was held that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase not acted upon will not of itself entitle the vendor to redeem. The Lord Chancellor seemed to attach some weight to *Goodman* v. *Grierson* (*q*), in which Lord Manners held, that the fair criterion to ascertain whether a transaction be a mortgage or not is, whether the remedies are mutual and reciprocal (*r*).

The rule is that *primâ facie* an absolute conveyance, containing nothing to show the relation of debtor and creditor, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every case the question is what, upon a fair construction, is the meaning of the instruments (*s*), and the absolute conveyance will be turned into a mortgage if the real intention was that the estate should be held as a security for the money (*t*). The deed may be absolute in form but still a mortgage (*u*), and the absence of a proviso for redemption will not prevent its being a mortgage (*x*). The somewhat analogous question whether a hire-purchase agreement is a bill of sale may be referred to as illustrating a similar principle (*y*).

(*m*) *Sevier* v. *Greenway*, 19 Ves. 413; *Fee* v. *Cobine*, 11 Ir. Eq. Rep. 406; *Waters* v. *Mynn*, 14 Jur. 341; *Murphy* v. *Taylor*, 1 Ir. Ch. 92; *Ogden* v. *Battams*, 1 Jur. N. S. 791.

(*n*) *Howard* v. *Harris*, 1 Vern. 192. See *Coplestone* v. *Boxwell*, 1 Ch. Ca. 1; *White* v. *Ewer*, 2 Vent. 340; *Stokes* v. *Verrier*, 3 Swanst. 634. As to Welsh mortgages, see *post*, p. 31.

(*o*) See *Talbot* v. *Braddyl*, 1 Vern. 395.

(*p*) 5 My. & Cr. 306. See *Barrell* v. *Sabine*, 1 Vern. 268; *Waters* v. *Mynn*, 14 Jur. 341.

(*q*) 2 Ba. & Be. 274.

(*r*) *Goodman* v. *Grierson*, 2 Ba. & Be. 274, cited in *Williams* v. *Owen*, 5 My. & Cr. 306.

(*s*) *Alderson* v. *White*, 2 De G. & J. 97, 105; *Shaw* v. *Jeffry*, 13 Moo. P. C. 432.

(*t*) *Douglas* v. *Culverwell*, 4 De G. F. & J. 20.

(*u*) *Barnhart* v. *Greenshields*, 9 Moo. P. C. 18; *Holmes* v. *Mathews*, 9 Moo. P. C. 413.

(*x*) *Bell* v. *Carter*, 17 Beav. 11.

(*y*) *Post*, p. 205.

Payment of interest.

The payment of interest will be evidence that the transaction was intended to be a mortgage (*z*).

Undervalue, &c.

The fact that the purchase-money is not near the value of the property may be taken into consideration as tending to show that the transaction was a mortgage (*a*).

Payment of expenses by grantor.

The payment by the grantor of the expenses of the conveyance will raise a *primâ facie*, but not a conclusive, presumption upon this question (*b*).

Notice of intention to repurchase.

A similar inference will be raised where the conveyance stipulates that the grantor shall give notice of any intention to repurchase on repayment of the purchase-money and interest due, together with an additional half-year's interest, so as to allow ample time for re-investment (*c*).

Option of purchase.

It was thought by Buckley, J., in a case before him (*d*), that where a condition gives mortgagees an option of purchase, which must be performed, if at all, before the legal right of redemption arises, the transaction is a conditional sale. But this view was not assented to by the Court of Appeal (*e*).

Conditional settlement.

Similarly, a conditional settlement has been held to be a security for money; as a settlement that, upon payment of a sum of money in a certain event, the prior limitation should cease and the lands go to the heirs and assigns of the settlor; upon the happening of the event, it was held only to be a security for the money, and to be redeemable after the time limited, and that not merely by the heir or executor, but also by a creditor (*f*).

Absolute conveyance fraudulently obtained.

An absolute conveyance, obtained under circumstances of surprise and oppression from a person intending only to borrow, was treated as a mortgage (*g*). So an absolute conveyance by a client to his solicitor of a reversionary interest was reduced to a mortgage, it not being proved that the nature of the transaction was fully explained to the client, or that full value was given (*h*).

Where an absolute interest is turned into a security and the

(*z*) *Allenby* v. *Dalton*, 5 L. J. K. B. 312.

(*a*) *Thornborough* v. *Baker*, 3 Swanst. 628, 631.

(*b*) *Alderson* v. *White*, 2 De G. & J. 97. See *Langton* v. *Horton*, 5 Beav. 9.

(*c*) *Lawley* v. *Hooper*, 3 Atk. 278; *Bulwer* v. *Astley*, 1 Ph. 422; *Verner* v. *Winstanley*, 2 Sch. & L. 393; *Preston* v. *Neele*, 12 Ch. D. 767.

(*d*) *Lisle* v. *Reeve*, (1902) 1 Ch. 53.

(*e*) *Ibid.*; and see (1902) 2 Ch. at p. 486.

(*f*) *Frederick* v. *Aynscombe*, 2 Eq. Ca. Abr. 594, note at B., 1 Atk. 392. And see *Sir Thomas Mans' case*, cited Freem. Ch. 206; *Earl Winchelsea* v. *Wentworth*, 1 Vern. 402; *Earl Winchelsea* v. *Norcliffe*, 1 Vern. 430.

(*g*) *Douglas* v. *Culverwell*, 4 De G. F. & J. 20.

(*h*) *Denton* v. *Donner*, 23 Beav. 285.

money is to be repaid, the Court in its discretion will allow 5 per cent. interest (*i*).

Presumption of sale.

Conversely, the fact that the grantee took possession immediately after the execution of the conveyance raises a presumption that the transaction was a sale (*k*).

No covenant for payment.

In several cases (*l*), the absence of a covenant to pay was deemed explanatory of the intention; so a trust deed for creditors was held, by reason of its containing no such covenant, not to be a mortgage entitling the creditors to foreclosure (*m*). But a covenant is not essential to a mortgage (*n*).

Length of possession by grantee.

Where the circumstances of a case are such as not to render it certain whether the original intention of the parties was to effect a mortgage or a conditional sale, the lapse of a considerable time during which the grantee has been in possession, as ostensible owner of the estate, will lead the Court to treat the transaction as a sale (*o*).

Principles on which Court acts in such cases stated.

The principles on which the Court acts in cases of conditional purchase are thus laid down by Lord Hardwicke (*p*):—"There is indeed a distinction in the nature of the transaction between a power of redeeming and of repurchasing, obtained by usage, which governs the sense of words. But it is well known that the Court leans extremely against contracts of this kind, where the liberty of repurchasing is made at the same time concomitant with the grant, as it must be considered in this case, being part of the same transaction; the Court going very unwillingly into that distinction, and endeavouring, if possible, to hold them to be cases of redemption. Although it is a different thing where the contract for liberty to repurchase is after a man has been for some time in possession of an estate and acting as owner under a purchase."

Devolution of purchase-money on repurchase.

An important consequence results from this distinction between a mortgage and a sale with a proviso for repurchase, viz., that in the latter case, if the party to whom the conveyance is first made dies seised, and after his death the option is declared

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(*i*) *Re Unsworth's Trusts*, 2 Dr. & Sm. 337; *Douglas* v. *Culverwell*, *sup.*; *Carter* v. *Palmer*, 8 Cl. & F. 657; *Macleod* v. *Jones*, 53 L. J. Ch. 534.

(*k*) *Williams* v. *Owen*, 5 My. & Cr. 303.

(*l*) *Mellor* v. *Lees*, 2 Atk. 494; *Floyer* v. *Lavington*, 1 P. Wms. 268. See *Davis* v. *Thomas*, 1 R. & My. 506.

(*m*) *Taylor* v. *Emerson*, 4 Dr. & W. 117; *Holmes* v. *Mathews*, 9 Mo. P. C. 413.

(*n*) *Ante*, p. 9.

(*o*) *Tull* v. *Owen*, 4 Y. & C. Ex. 192; *Alderson* v. *White*, 2 De G. & J. 97.

(*p*) In *Longuet* v. *Scawen*, 1 Ves. Sen. 401, at p. 404. See *Floyer* v. *Sherard*, Amb. 18.

by the other party to take the estate, the purchase-money belongs to the heir, and not, as it would if it had been a mortgage, to the executor. Thus, upon an election to repurchase, the money was decreed to the heir in preference to the executors, on the ground that it was not the case of a mortgage, but a mere collateral agreement to repurchase (*q*). This must, however, now be read subject to the provisions of the Land Transfer Act, 1897.

No mutuality of remedies in case of defeasible purchase.

It may be observed that, in cases of conditional sale or settlement, there is no mutuality in point of remedy between the parties, inasmuch as though the vendor has the option of redeeming by repaying the purchase-money and interest within the specified period, the purchaser has no right to compel such repayment, and therefore there can be no foreclosure.

Parol evidence as to nature of transaction.

Equity will admit parol evidence to show that a conveyance, which is absolute in its terms, was intended by way of security only (*r*), and that a transaction though in form a sale is in reality a mortgage (*s*). A case decided by Lord Chancellor Nottingham is one of frequent reference (*t*). A man agreed to lend money on mortgage, and it was proposed, as was formerly practised, that the mortgagor should execute an absolute conveyance, and that there should at the same time be a deed of defeasance from the mortgagee. The mortgagor executed the conveyance, and then the mortgagee refused to execute the defeasance. Lord Nottingham (after the Statute of Frauds) admitted parol evidence to show the agreement, and decreed against the mortgagee.

So, where (*u*) an absolute conveyance is made for a certain sum of money, and the person to whom it is made, instead of entering and receiving the profits, demands interest for his money, and has it paid him, this will be admitted to explain the nature of the conveyance; and if the conveyance be abso-

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(*q*) *Thornborough* v. *Baker*, 3 Swanst. 628, 631.

(*r*) *England* v. *Codrington*, 1 Ed. 169; *Vernon* v. *Bethell*, 2 Ed. 110; *Reeks* v. *Postlethwaite*, G. Coop. 161; *Hodle* v. *Healey*, 1 V. & B. 540; *Barton* v. *Bank of New South Wales*, 15 App. Ca. 379.

(*s*) *Exp. Odell*, 10 Ch. D. 76; *Re Watson*, 25 Q. B. D. 27.

(*t*) *Maxwell* v. *Lady Montacute*, Prec. Ch. 526. See also *Walker* v. *Walker*, 2 Atk. 99; *Young* v. *Peachey*, 2 Atk. 254, 257; *Joynes* v. *Statham*, 3 Atk. 388; *Dixon* v. *Parker*, 2 Ves. Sen. 225; *Lincoln* v. *Wright*, 4 De G. & J. 16; *Gordon* v. *Selby*, 11 Bli. N. S. 351; *Haigh* v. *Kaye*, L. R. 7 Ch. 469; *Booth* v. *Turle*, L. R. 16 Eq. 182.

(*u*) *Maxwell* v. *Montacute*, Prec. Ch. 526; *Card* v. *Jaffray*, 2 Sch. & L. 374; *Lord Irnham* v. *Child*, 1 Bro. C. C. 92; *Cripps* v. *Jee*, 4 Bro. C. C. 471; but see *Lord Portmore* v. *Morris*, 2 Bro. C. C. 218.

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lute, and a suit be brought to redeem, and the defendant swear it was an absolute purchase, nevertheless parol evidence will be admissible to show the contrary (*x*). And an indorsement on the deed of conveyance, signed by the mortgagor only, is evidence to show the intent (*y*); as is also a note in writing signed by the parties (*z*); but in an instance where an absolute conveyance for 80*l*. was made, and on bill filed to redeem, the defendant by his answer insisted that it was intended to be an absolute conveyance, without proviso and condition for redemption, but admitted that it was in trust after payment of the 80*l*. and interest for the plaintiff's wife and children, though no such trust was declared by writing; the plaintiff insisted that, as the defendant had confessed he was not to have the estate absolutely and had not proved the trust, he, the plaintiff, was entitled to redeem. The Court, however, decreed the trust for the benefit of the plaintiff's wife and children (*a*).

In a case where husband and wife had made an absolute conveyance of the wife's real estate by way of sale with fine, and from subsequent deeds between the same parties, an inference might have been drawn that the original deeds were intended by way of mortgage, and there was a direct recital of the fact in one of the deeds produced from the possession of the party claiming as purchaser; still, as there was no other direct evidence, and that deed was not signed by such party, and a great lapse of time had intervened, and the witnesses were all dead, the Court refused to interfere on behalf of the heir of the wife, who claimed to redeem, alleging that the effect of the deed had been only to pass an absolute estate during the life of the husband (*b*).

In the case of a conveyance, which was absolute on the face of it, but of which the consideration was in fact a sum paid to the grantor's creditors, on a bill filed for a reconveyance, the grantee claimed the benefit of the securities as mortgagee; the Court held that the grantee had mixed up the character of trustee, mortgagee and agent, and decreed an account, without allowing interest on either side, and, although a small balance

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(*x*) *Francklyn* v. *Fern*, Barn. Ch. R. 30; *Whitfield* v. *Parfitt*, 4 De G. & S. 240.

(*y*) *Francklyn* v. *Fern*, *sup.*

(*z*) *Clench* v. *Witherley*, Finch, 376.

(*a*) *Hampton* v. *Spencer*, 2 Vern. 288.

(*b*) *Tull* v. *Owen*, 4 Y. & C. Ex. 192.

was found due to him, yet, on further directions, the Court refused to allow him interest on it, and decreed a reconveyance and payment of the balance then become due from him, and, he having lost some of his vouchers, refused him the costs of taking the account (*c*).

It may be remarked, that the circumstance of an agreement to reconvey, although entered into at the time of conveyance, is not sufficient to convert the transaction into a mortgage if there be evidence to rebut the presumption (*d*).

Parol evidence admissible as to fraud.

Upon the principle that the Statute of Frauds will not be allowed to cover fraud, parol evidence will be admissible to show that an equity of redemption reserved by the deed to one person really belongs to another, if the Court is persuaded that it is not honest for the party relying upon the statute to keep the property. So, where a wife, by a deed in form absolute, assigned to her husband a leasehold house belonging to her, which he mortgaged for payment of his own debts; the wife joined with the husband in covenanting to pay the mortgage debt, but the equity of redemption was reserved to the husband alone. Parol evidence was admitted to show that the wife had assigned the house only to enable him to mortgage it in his own name, and that it was part of the arrangement between them that he should re-assign the equity of redemption to her (*e*).

(*c*) *Price* v. *Price*, 15 L. J. Ch. 13.

(*d*) *Barrell* v. *Sabine*, 1 Vern. 268; *Williams* v. *Owen*, 5 My. & Cr. 306; *Perry* v. *Meddowcroft*, 4 Beav. 197.

(*e*) *Re Duke of Marlborough*, *Davis* v. *Whitehead*, (1894) 2 Ch. 133; and see *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196, C. A.

CHAPTER III.

WELSH MORTGAGE.

i.—Different Kinds of Welsh Mortgages.—A Welsh mortgage in its original and strict form closely resembles the *mortuum vadium* described by Glanville (*a*), being a conveyance of an estate redeemable at any time on payment of the principal without interest: the rents and profits of the estate until such redemption being taken without account by the mortgagee in lieu of interest (*b*).

Another kind of Welsh mortgage, or security in the nature of a Welsh mortgage, rather resembling the ancient *vivum vadium,* is where an estate is assured to the mortgagee in fee or for a long term of years until out of the rents and profits he shall have received the amount of principal and interest.

A third variation of this form of security is, where an estate is demised to the mortgagee for a short term of years, to the intent that he may take the rents and profits during the term in lieu and full satisfaction of principal and interest, with a proviso for redemption at any time during the term on payment of principal and interest then due. On the expiration of the term the property will revert to the mortgagor discharged from the debt.

Although a lease granted in consideration of a loan of money is impeachable, yet it has been held that a lease granted as a security for a loan at a fair rent to be retained in payment of the debt is valid, and the Court will not enter into an inquiry as to the value of the rent after long acquiescence on the part of the debtor; and such a lease is in the nature of a Welsh mortgage (*c*). But in the case here referred to a renewed lease, granted before the expiration of the old lease,

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(*a*) Lib. 10, cap. 6.

(*b*) See *Talbot* v. *Braddyl*, 1 Vern. 394.

(*c*) *Morony* v. *O'Dea*, 1 Ba. & Be. 109.

at the old rent, to secure the balance then due and a further loan, and which was, on the face of it, at an undervalue, was set aside as fraudulent, and the mortgagee made to account from that time for the full value of the premises; and, as being guilty of a fraud, was refused costs.

ii.—Nature and Characteristics of Welsh Mortgages.—These various forms of security have certain incidents in common. The mortgagee has no power to compel redemption, nor any right to foreclosure, though the mortgagor may redeem at any time (*d*). No covenant for payment of the debt is usually inserted in the mortgage deed (*e*), and, in the absence of such a covenant, whether a contract for payment of the money is to be implied so as to enable the mortgagee to sue for the debt would seem to depend on the form of the security taken in the particular case (*f*). The presence of a covenant to pay the principal and interest on demand is not such a limitation of the time as to lead to forfeiture, and so let in foreclosure (*g*).

Relation of mortgagee to mortgagor under Welsh mortgage.

The position of a mortgagee, to whom an estate is conveyed until he shall have received principal and interest out of the rents and profits, was compared by Lord Hardwicke (*h*) to a tenancy by *elegit*, so that as soon as the principal and interest were satisfied the estate ceased and the mortgagor might maintain ejectment, unless the mortgagee had remained in possession twenty years (now twelve years (*i*)) after the debt was satisfied, at which time the Statute of Limitations would have begun to run; which circumstance would also bar the mortgagor of any equity of redemption (*k*). And his Lordship said that the mortgagor had the same right as the conusor under the *elegit* had, to come into a Court of Equity for an account of the rents and profits; nor would the Court relieve the mortgagee from his own contract and agreement of being subject to a perpetual account (*h*).

In *Hartpole* v. *Walsh* (*l*), a bill to redeem a mortgage in the nature of a Welsh mortgage was dismissed in the Irish Chancery,

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(*d*) *Talbot* v. *Braddyl*, 1 Vern. 394; *Howell* v. *Price*, Pr. Ch. 423. See *Longuet* v. *Scawen*, 1 Ves. S. 402.

(*e*) *Lawley* v. *Hooper*, 3 Atk. 280; *King* v. *King*, 3 P. Wms. 361.

(*f*) *Infra*, p. 34.

(*g*) *Curtis* v. *Holcombe*, 6 L. J. N. S. Ch. 156. And see *O'Connell* v. *Cummins*, 2 Ir. Eq. R. 251.

(*h*) *Yates* v. *Hambly*, 2 Atk. 362.

(*i*) 37 & 38 Vict. c. 57, s. 7, *post*, Chap. XXXIX.

(*k*) And see 3 & 4 Will. IV. c. 27, s. 28.

(*l*) 5 Bro. P. C. 267.

and on appeal to the House of Lords the judgment was affirmed; but in that particular case a second mortgage had been made to the same party, by which the mortgagor had agreed to repay the whole debt at any time after eighteen months' notice, and it was admitted that the notice had long since been given; which reduced it to the case of a common mortgage. But in a later case, Lord Lyndhurst considered the decision in the last-mentioned case to have been made on the ground of the impossibility of taking the long and complicated accounts after the lapse of ninety years, and that the redemption suit had not been prosecuted with reasonable dispatch (*m*). In that case a reversion in fee, expectant on a life estate, had been demised for a term of 500 years, with a proviso for redemption on payment of the mortgage debt, but without any definite time fixed for payment, and the mortgagor covenanted to pay the *mortgage debt on demand,* and that until payment the mortgagee might enter and enjoy the premises. Lord Lyndhurst held this to be in the nature of a Welsh mortgage, and dismissed a bill filed for foreclosure (*m*).

Time no bar to redemption.

In a case where the transaction appeared to be in the nature of a Welsh mortgage, Lord Eldon observed that time would be no bar to redemption, unless it were proved that the party had held over for the space of twenty years (now twelve years) after the debt was fully paid and satisfied; that if it was not a case in which length of time alone would operate as a bar to redemption, the question still remained whether there were not circumstances to raise the presumption of a release from the long possession of the mortgagee. The question was submitted to a jury, who found a verdict for the mortgagor, which was sustained (*n*).

Although by s. 28 of 3 & 4 Will. IV. c. 27, as subsequently noticed (*o*), the right of redemption by a mortgagor was lost at the end of twenty years (now reduced to twelve (*p*)) next after the mortgagee takes possession, unless there has been some intermediate acknowledgment of right, yet it is conceived that this enactment cannot apply to the case of Welsh mortgages (in which the original stipulation is, that the mortgagee shall hold and receive the rents until his debt is satisfied) unless twenty (now twelve) years shall have elapsed from the period when, by

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(*m*) *Teulon* v. *Curtis*, Yo. 619.

(*n*) *Fenwick* v. *Reed*, 1 Mer. 114.

(*o*) See *post*, Chap. XXXIX.

(*p*) 37 & 38 Vict. c. 57, s. 7.

the receipt of the rents, the mortgage debt and interest might have been paid (*q*).

In one case time was held to be no bar to redemption, although upwards of sixty years had elapsed since the mortgagee took possession (*r*).

How far the mortgagor is personally liable for payment.

iii.—Rights and Liabilities of Parties under Welsh Mortgages.—With regard to the personal liability of the mortgagor to repay the amount advanced, the effect would appear to be different according to the form of the security adopted. In the case of a Welsh mortgage proper, it is conceived that an action of debt for the principal would lie as in the case of an ordinary mortgage (*s*); though not apparently in respect of interest, the receipt of the rents and profits being, by the terms of the contract, in lieu and satisfaction of interest. In a case (*t*) of an ordinary mortgage, without any covenant to pay the debt, Lord Chancellor Talbot was of opinion that every mortgage implies a loan, and that every loan implies a debt, and that though there were no covenant or bond, yet the personal estate of the borrower remained liable to pay off the mortgage, and his lordship said that this was so in the case of Welsh mortgages, where no day certain is appointed for payment, but the matter is left at large.

Where the security is in the nature of a Welsh mortgage in the form whereby the rents and profits are to be taken by the mortgagee until all that is due to him for principal and interest is satisfied, all personal liability of the borrower appears to be necessarily excluded by the nature of the agreement between the parties.

And where it was agreed in writing that, in consideration of an advance, the borrower should let certain land to the lender for six years, the borrower to get back his lands on repayment of the advance, but there was no express agreement by the borrower to repay the money lent, it was held that there was no personal liability on the borrower to do so, and that an action of debt brought by the representatives of the lender after the expiration of the term could not be sustained (*u*).

(*q*) *Fenwick* v. *Reed*, 1 Mer. 114.

(*r*) *Orde* v. *Heming*, 1 Vern. 418.

(*s*) See *ante*, p. 10.

(*t*) *King* v. *King*, 3 P. Wms. 361.

(*u*) *Cassidy* v. *Cassidy*, 24 L. R. Ir. 577.

Mortgagee's liability to account.

A further point arises in respect of the mortgagee's liability to account. This, again, would seem to depend upon the precise nature of the security in question.

Where rents are taken in lieu of interest.

Where the mortgage is a Welsh mortgage properly so called, *i.e.*, where by the terms of the mortgage contract it is agreed that the mortgagee shall take the rents and profits of the land in lieu of interest until the mortgagor thinks fit to redeem, it appears unreasonable to suppose that the Court would direct an account, and by so doing relieve the mortgagor of a bargain in its terms determinable at his own instance.

It is true that in some cases (*x*), where the accrual of rents and profits was equivalent to the payment of an excessive rate of interest, the Court has directed an account to be taken, and upon this it has been assumed that the Court would be willing to do so in every instance at the present day; it is to be observed, however, that the decisions referred to were all of them previous in date to the repeal of the usury laws (*y*), and it may be doubted whether they would now carry the weight attributed to them.

Where rents taken are to be applied in reduction of principal.

Where, however, the mortgage is of a kind requiring the mortgagee to apply the rents and profits in reduction of the principal sum advanced and interest, whether it be of the fee or for a term of years, it would seem that a direction that an account be taken would be incident to an action for redemption by the mortgagor, just as in the case of an action against a mortgagee in possession under an ordinary mortgage (*z*).

Determination of mortgage for term.

Although in the case of a Welsh mortgage of the fee or for a long term of years, the security will invariably be terminated by redemption on the part of the mortgagor, a Welsh mortgage for a short term of years may determine by effluxion of time, in which case the liability of the mortgagee to account would apparently depend upon the intention of the parties as expressed or to be inferred from the terms of the contract.

Trustees may effect Welsh mortgage.

It has been decided in an Irish case that a trustee empowered to raise money by mortgage may effect a Welsh mortgage (*a*);

(*x*) *Fulthorpe* v. *Foster*, 1 Vern. 477. See *Alderson* v. *White*, 2 De G. & J. 97; *Longuet* v. *Scawen*, 1 Ves. Sen. 403; *Balfe* v. *Lord*, 2 Dr. & War. 480.

(*y*) 17 & 18 Vict. c. 90.

(*z*) See *Teulon* v. *Curtis*, Yo. 619.

(*a*) *Gorman* v. *Byrne*, 8 Ir. Com. L. 394.

such mortgages appear, however, to have been formerly very common in Ireland (*b*).

Whether statutory powers of sale apply to Welsh mortgages.

The continuing right of redemption incident to a Welsh mortgage would apparently be sufficient to prevent the power of sale given to mortgagees by sect. 19, sub-sect. (1) of the Conveyancing Act, 1881, from applying to such a security. Having regard to the fact that the definition of "mortgage" in sect. 2 of that Act includes a "charge," it would seem that such powers and provisions of the Act relating to mortgages as are not inconsistent with the nature of Welsh mortgages will be applicable thereto.

(*b*) See *Hartpole* v. *Walsh*, 5 Bro. P. C. 267, at p. 275.

CHAPTER IV.

ANNUITY DEEDS AND RENTCHARGES.

1.—**Nature and Incidents of the Security.**—A form of security for repayment of money advanced, which was formerly extensively used and is still adopted by some insurance societies, is that of a grant not of the estate itself, but of an annuity or rentcharge arising thereout, with a power of repurchasing the same on payment of a specified sum.

Grants of repurchase-able annuities by way of security.

The Courts of Equity were formerly strongly inclined to regard grants of annuities, where the power of repurchasing is given at the same time with the grant and as part of the same transaction, as being contracts not for absolute sale, but for securing a loan, and have therefore, as far as possible, disregarded any conditions as to time or mode of repayment, and treated the grants as liable to redemption in like manner as mortgages (*a*).

Presumption in equity of right to redeem.

A ground for this construction arises, when the deed contains a stipulation for notice to be given of the grantor's intention to repurchase, and for repayment of the original purchase-money, with all arrears of the annuity, and a half-year's payment in addition, so as to allow ample time to find out another hand to take the money, and to secure the interest in the meantime (*b*).

Notice of intention to repurchase.

The fact of there being an immediate remedy by covenant or otherwise against the person of the grantor, while there is no *present* remedy against the property (as in the ordinary power of distress and entry after default in payment for twenty-eight days), leads to an inference that the estate is only meant as a security (*c*). But, on the other hand, the express exemption of

Personal covenant for payment.

(*a*) *Longuet* v. *Scawen*, 1 Ves. Sen. 404; *Floyer* v. *Sherard*, Amb. 18. See *Secretary of State for India* v. *British Empire Mutual Life Ass. Co.*, 67 L. T. 434, C. A.

(*b*) *Verner* v. *Winstanley*, 2 Sch. & L. 293; *Lawley* v. *Hooper*, 3 Atk. 278.

(*c*) *Bulwer* v. *Astley*, 1 Ph. 422; *Kenney* v. *Lynch*, 2 J. & L. 330.

the grantor from all personal liability (which renders the case very similar to a Welsh mortgage) does not affect the right of redemption (*d*); though in some cases the absence of a covenant for payment has led the Court to treat the transaction as an absolute sale of the annuity, subject to a power of repurchase, the conditions of which must be strictly observed (*e*).

Evidence of nature of transaction.

At the present time it would seem that the Court will not treat a grant of an annuity with power to repurchase as a mere redeemable security for a debt or loan without clear proof that such was the nature of the transaction (*f*).

Perpetual rentcharges or annuities, unless created as consideration for the purchase of the land out of which they issue, are redeemable under s. 45 of the Conveyancing Act, 1881.

Form of annuity deeds to secure advances.

Redeemable annuities are now seldom given except by tenants for life, in which case the form of the annuity deed usually consists of the grant of an annuity for a life or lives, or for a term of years determinable upon a life or lives with a covenant by the grantor to pay the annuity.

Powers of distress, &c.

ii.—Remedies of Annuitants.—Formerly an annuity deed usually contained express powers of distress and entry upon the lands charged with the annuity, and a demise of the land to trustees for a term of years upon trusts to secure the annuity.

When an annuity is secured in the usual way by a power of entry in the annuitant and a trust term in the trustee, the power of entry is not inconsistent, even at law, with the term, and if the grantor, under the provisions of the annuity deed, becomes tenant to the trustee of the term at a rent, the annuitant can, upon default made in payment of the annuity for the period specified, bring an action against the grantor under the power of entry; but ejectment will not lie by the trustee of the term, without notice to quit first given to the grantor. It would seem that the power of entry would not be exerciseable after a mortgage made by the trustee under the trusts of the term (*g*).

(*d*) *Longuet* v. *Scawen*, 1 Ves. Sen. 404; but see *Williams* v. *Owen*, 5 My. & Cr. 303.

(*e*) *Mellor* v. *Lees*, 2 Atk. 494; *Floyer* v. *Lavington*, 1 P. Wms. 268.

(*f*) See *Knox* v. *Turner*, L. R. 5 Ch. 515; *Preston* v. *Neele*, 12 Ch. D. 760.

(*g*) *Doe* v. *Lord Kensington*, 8 Q. B. 429.

Remedies for recovery of annual sums charged on land.

Now, however, by s. 44 of the Conveyancing Act, 1881 (*h*), the usual powers of distress and entry are given to every person having a rentcharge or annuity charged upon land, and also a power to demise the land to a trustee for a term of years upon trust to raise and pay the annual sum and costs. The section only applies so far as a contrary intention is not expressed and so far as the remedies might have been conferred by the instrument under which the annual sum arises. The section does not extend to Ireland.

The powers and remedies conferred by s. 44 are exerciseable whether the annual sum is created under a power in an instrument before or after the Act of 1881 (*i*).

The rule against perpetuities does not apply to powers or remedies conferred by s. 44 (*k*).

The remedies given by this section do not prevent recourse to other remedies (*l*).

The Court has a discretionary power to order a mortgage or sale of land to raise arrears of a jointure rentcharge issuing out of rents and profits, though there is no express charge on the land (*m*).

But where a rentcharge is charged on the fee simple but a term is vested in trustees for raising the charge, the owner of the rentcharge must resort to the term and is not entitled to an order for sale (*n*).

A mortgagee in fee of land which is subject to a rentcharge is personally liable to pay the rentcharge although he has never been in possession (*o*). So a tenant for life is liable though the annual profits fall short of the amount of the charge (*p*).

Grant of annuity void unless registered.

iii.—Registration of Annuities.—The Annuity Act (*q*), which required the enrolment of grants of annuities or rentcharges for life or lives, or term of years, or greater estate determinable on lives, was founded on the principle that life annuities, as offering the means of evading the laws against usury, required to be watched with peculiar jealousy. When

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(*h*) 44 & 45 Vict. c. 41.

(*i*) 1 & 2 Geo. V. c. 37, s. 6.

(*k*) *Ibid.*

(*l*) *Searle* v. *Cooke*, 43 C. D. 519.

(*m*) *Hambro* v. *Hambro*, (1894) 2 Ch. 564.

(*n*) *Blackburne* v. *Hope-Edwards*, (1901) 1 Ch. 419. See Chap. XLIX. s. 2 (ii).

(*o*) *Cundiff* v. *Fitzsimmons*, (1911) 1 K. B. 513. See *post*, p. 179.

(*p*) *Pertwee* v. *Townsend*, (1896) 2 Q. B. 129; cf. *Re Herbage Rents*, (1896) 2 Ch. 811.

(*q*) 53 Geo. III. c. 141.

the usury laws were repealed (by 17 & 18 Vict. c. 90), the Annuity Act shared the same fate; but by 18 & 19 Vict. c. 15, s. 12 (1855), after the passing of the Act, unless a memorandum is registered at the Common Pleas (now at the Land Registry Office (*r*)) in the name of the grantor any annuity or rentcharge, granted after the passing of the Act (otherwise than by marriage settlement) for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless or until a memorandum or minute containing the name, place of abode, and title, trade or profession of the person whose estate is intended to be affected thereby, and the date of the instrument by which the annuity is granted, and the annual sum or sums to be paid, be left at the Land Registry Office for registration according to the Act. By sect. 14 it is provided that the Act shall not extend to require the registry of annuities or rentcharges given by will.

Effect of omission to register.

It was held, on the construction of the last-mentioned Act, that want of registration does not make a grant of an annuity void as against a subsequent purchaser or incumbrancer who had notice of it, or as against the trustee in bankruptcy of the grantor (*s*).

(*r*) 63 & 64 Vict. c. 26.
(*s*) *Greaves* v. *Tofield*, 14 Ch. D. 563, C. A.

CHAPTER V.

OF STOCK MORTGAGES.

What are stock mortgages

STOCK in the public funds may be the subject of loan. Mortgages so framed as to secure the replacement of stock lent are usually known as stock mortgages.

During the war in the early part of the last century, when the price of stock was so low as to yield more than 5 per cent. interest on the money invested, stock mortgages were frequent, and almost superseded money mortgages; but since the repeal of the usury laws (*a*) they have nearly disappeared, though they have to some extent revived during times of depression on the stock markets (*b*).

Whether trustees may lend on stock mortgage.

One case in which they are sometimes employed is that of trustees who have no power to lend on mortgage, but are desirous to accommodate *cestuis que trust* with a loan of money, and to secure the repurchase of the exact sum of stock sold instead of the repayment of the sum of money advanced. Such a loan, being a transaction by which a less perfect security is substituted for a more perfect one, is not a proper investment of trust funds, unless expressly authorized by the instrument creating the trust (*c*).

Loans of stock lawful.

A loan of stock was lawful, notwithstanding the Stock Jobbing Act (*d*). The parties may agree that a sum of money equal to the dividends shall be paid in the meantime, although the dividends shall exceed 5 per cent. on the money produced by the sale of the stock; for the lender takes the hazard of the rise and fall of the market price, and if an action is brought on a bond given as a security for the transfer of stock, in estimating the measure of damages, the lender will be entitled to recover the highest value of the stock on the day of trial (*e*); and if a bonus has been declared on the stock, the lender will

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(*a*) By the stat. 17 & 18 Vict. c. 90. Numerous cases on stock mortgages are collected in Coote on Mortgages (3rd ed.), p. 274. See also *Att.-Gen.* v. *Hollingworth*, 2 H. & N. 416; *Baskett* v. *Skeel*, 11 W. R. 1019; *Goddard* v. *Lethbridge*, 16 Beav. 529.

(*b*) 2 K. & E. (9th ed.), p. 139.

(*c*) *Pell* v. *De Winton*, 2 De G. & J. 19; *Whitney* v. *Smith*, L. R. 4 Ch. 513.

(*d*) 7 Geo. II. c. 8. See *Sanders* v. *Kentish*, 8 T. R. 162.

(*e*) *Shepherd* v. *Johnson*, 2 East, 211.

have a right to insist on the replacement of the original stock increased by the amount of bonus, and to dividends in the meanwhile on the bonus as well as on the stock (*f*). So a *bonâ fide* contract for the transfer of stock is good, though the transferor is not possessed of it at the time of the agreement (*g*).

It is not material whether the stock is actually transferred to the mortgagor, or whether the stock is sold out, and the net produce paid to him (*h*).

If a person is indebted to another in a sum of money, an agreement between them that the debtor shall transfer to the creditor within a given time such a quantity of stock as the amount of the debt would have purchased on the day of the agreement, and pay dividends in the meantime, is lawful (*i*).

Rights under covenant to replace stock.

It seems that if the re-transfer of the stock be secured merely by a bond or covenant on the failure of the borrower to replace the stock by the appointed day, the lender may recover at his option either the present value of the stock or its value upon the day when it ought to have been replaced (*k*).

Where the term is expired, redemption will be decreed on replacing the same amount of stock although the price has fallen (*l*).

Where a rentcharge was redeemable by a specified amount of 3 per cent. consols, the party was held entitled to redeem by transferring the same amount of new $2\frac{3}{4}$ per cent. consols under the National Debt (Conversion) Act, 1888 (*m*), and so in the case of a stock mortgage (*n*).

But where the proviso for redemption was on the transfer of stock producing 3 per cent. *at least*, it was held that a 3 per cent. stock must be transferred (*o*).

Statutory powers of sale, &c.

By sect. 2, sub-sect. (6), of the Conveyancing Act, 1881 (*p*), the expression "mortgage" includes a charge for securing money's worth; the statutory powers of sale, &c. given to mortgagees by that Act consequently apply to stock mortgages, if effected by deed executed after the commencement of the Act.

(*f*) *Vaughan* v. *Wood*, 1 My. & K. 403.

(*g*) *Mortimer* v. *McCallan*, 7 M. & W. 20.

(*h*) *Tate* v. *Wellings*, 3 T. R. 537.

(*i*) *Maddock* v. *Rumball*, 8 East, 304.

(*k*) *McArthur* v. *Seaforth*, 2 Taunt. 257. See *Shepherd* v. *Johnson*, 2 East, 211; *Shaw* v. *Holland*, 10 Jur. 103.

(*l*) *Blyth* v. *Carpenter*, L. R. 2 Eq. 501.

(*m*) *Northumberland (Duke)* v. *Percy*, (1893) 1 Ch. 298.

(*n*) *Re Borough's Estate*, 31 L. R. Ir. 244.

(*o*) *Re Hall's Estate* (1903), 1 Ir. R. 475.

(*p*) 44 & 45 Vict. c. 41.

CHAPTER VI.

MORTGAGES UNDER THE LAND TRANSFER ACTS, 1875 AND 1897.

Registration.

THERE is no compulsion under the Acts to register except on the first sale after the Act of 1897 has become applicable (*a*).

Notwithstanding that the land has become registered land it may still be mortgaged or dealt with by deeds having the same operation and effect as if the land were unregistered, subject to the title being impaired by the exercise of the statutory powers of disposition given to the registered proprietor, but the mortgagee can by an entry on the register protect himself against this risk. The transfer by such a disposition takes effect by virtue of an overriding power and not by virtue of any estate (*b*).

A mortgagee cannot insist on the registration of a deed of charge in the statutory form with the addition of a conveyance of the legal estate (*c*).

The act of the registrar in putting the name of a transferee of a charge on the register is a mere ministerial act in the performance of a ministerial duty. It confers on the transferee no estate or right which he had not before registration. The utmost it confers on him is the capacity to transfer to a purchaser for valuable consideration unaware of any irregularity in the transaction (*d*).

In the case of the registration of the transfer of a charge under sect. 40 of the Act of 1875, no person, other than the person first registered, can claim any beneficial right or interest from the mere fact of being on the register unless he can also prove that he has a transfer from some person previously on the register, and in that sense has relied upon the register (*e*).

A mortgagee by sub-demise of registered leaseholds selling

(*a*) *Capital and Counties Bank* v. *Rhodes*, (1903) 1 Ch. 631.

(*b*) *Ibid.*

(*c*) *Ibid.*

(*d*) *Att.-Gen.* v. *Odell*, (1906) 2 Ch. 47.

(*e*) *Ibid.*

under the power of sale is not a vendor of registered land within sect. 16 (2) of the Act of 1897, and need not get himself registered as proprietor of the charge (*f*).

Mortgages within the Acts.

All mortgages and charges are within the Acts including a sub-lease, but not including a term created for mortgage purposes (*g*).

Mortgages and charges of registered land may be made in three principal ways:—(1) By a statutory instrument of charge completed by registration (*h*); (2) By mortgage or charge off the register protected by a caution or restriction (*i*), or by a statutory transfer to the mortgagee with a caution to protect the equity of redemption; (3) By deposit of the land certificate protected by notice, which notice will operate as a caution (*k*).

The Act of 1875, as modified by the Act of 1897, contains the following provisions with regard to incumbrances:—

Discharge of incumbrance.

S. 19. "Where upon the first registration of any freehold or leasehold land, notice of an incumbrance affecting such land has been entered on the register, the registrar shall, on proof to his satisfaction of the discharge of such incumbrance, notify in the prescribed manner on the register, by cancelling the original entry or otherwise, the cessation of such incumbrance."

For the procedure under this section, see Rules 216, 217.

The first schedule to the Act of 1897 provides that this section "shall apply to part discharges." This, it would seem, means a discharge either of part of the money or part of the land (*l*). But in the case of discharge of part of the money it would be prudent for a purchaser or puisne mortgagee, notwithstanding notification, to inquire as to the state of the mortgage debt.

Creation of charges and delivery of certificates of charge.

S. 22. "Every registered proprietor of any freehold or leasehold land may, in the prescribed manner, charge such land with the payment at an appointed time of any principal sum of money either with or without interest and with or without a power of sale to be exercised at or after a time appointed. The charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge, and the particulars of the charge, and of the power of

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(*f*) *Re Voss and Saunders*, (1911) 1 Ch. 42.

(*g*) Act of 1875, s. 11, as amended by schedule to Act of 1897.

(*h*) *Ibid.* s. 22, and r. 158. See Form 44.

(*i*) *Ibid.* s. 49.

(*k*) Act of 1897, s. 22 (6) (f), and r. 243, *post*, p. 76.

(*l*) See Form 50.

sale, if any; and the registrar shall also, if required, deliver to the proprietor of the charge a certificate of charge in the prescribed form."

Charges created under this section are subject to the provisions of the principal Act in respect of qualified or possessory titles (*m*).

The section applies to an annuity or other periodical payment (*n*).

Sub-charges can be created in the same manner as charges *mutatis mutandis,* and, subject to any entry to the contrary, will rank according to the order in which they are entered on the register (*o*).

A charge can also be created by a person entitled to be registered as proprietor before being himself actually so registered (*p*).

The registrar may, on the application or with the consent of the registered proprietor and of the proprietors of all registered charges of equal or inferior priority, alter the terms of a charge (*q*).

It seems to be no longer necessary to enter the power of sale, since under sect. 9 (2) of the Act of 1897 the provisions of the Conveyancing Act, 1881, ss. 19—24, with certain exceptions, apply to registered charges (*r*).

The words "if required" are modified by the Act of 1897, s. 8 (1).

An exception to the use of the prescribed form of charge is made in favour of incorporated building societies (*s*), and in practice this exception is extended to friendly and industrial and provident societies.

Nothing contained in a charge will take away the registered proprietor's statutory power of transferring it by a registered disposition, or of requiring the cessation thereof to be noted on the register (*t*).

Nor can the power to consolidate charges (which may be reserved by excluding sect. 17 of the Conveyancing Act, 1881) affect any registered land in respect of which the charge is not expressly registered (*u*).

(*m*) Act of 1897, Schedule.
(*n*) *Ibid.* s. 9 (3).
(*o*) Rules 178, 179.
(*p*) Act of 1897, s. 9 (6).
(*q*) *Ibid.* s. 9 (5).
(*r*) *Ibid.* s. 9 (2).
(*s*) *Ibid.* s. 9 (3).
(*t*) *Ibid.* s. 9 (4).
(*u*) Act of 1897, and see r. 169.

It does not appear that a charge confers the legal estate on the creditor, though by exercising his power of sale he has power to confer it or its equivalent by statutory transfer (*x*).

In charges of leaseholds it does not appear that privity is established between the charge creditor and lessor, though if the creditor sells under his power of sale privity seems to be established between the purchaser and lessor (*y*).

In the case of sub-charges inquiry should be made as to the state of the mortgage debt, since registered charges are still matters of account.

The charge should be completed by registration as soon as possible, as priority depends upon the time of delivery at the registry (*z*).

Implied covenant to pay charges.

S. 23. "Where a registered charge is created on any land, there shall be implied on the part of the person being registered proprietor of such land, at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negativing such implication, a covenant with the registered proprietor for the time being of the charge to pay the principal sum charged, and interest, if any, thereon, at the appointed time and rate; also a covenant if the principal sum or any part thereof is unpaid at the appointed time, to pay interest half-yearly at the appointed rate on so much of the principal sum as for the time being remains unpaid."

For a form negativing this implication, see Form 44. If inserted in the charge it is entered on the register as a matter of course (*a*). Trustees should be careful to insert this provision.

The implied covenant seems to apply to an annuity or periodical payment under sect. 9 (3) of the Act of 1897.

Where the land is sold subject to the charge, covenants by either party to pay the money owing and to indemnify the other party may be added to the instrument of transfer, and may be noted on the register (*b*).

Implied covenant in case of leaseholds to pay rent, &c., and indemnify proprietor of charge.

S. 24. "Where a registered charge is created on any leasehold land, there shall be implied on the part of the person being registered proprietor of such land at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negativing such implication, a covenant with the registered proprietor for the time being of the charge that the

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(*x*) Act of 1875, ss. 27, 30, 35. See *Capital and Counties Bank* v. *Rhodes*, (1903) 1 Ch. 631.

(*y*) Act of 1875, ss. 27, 35.

(*z*) Rules 23, 111—113.

(*a*) Rule 158.

(*b*) Rule 133.

person being registered proprietor of such land at the time of the creation of the charge, his executors, administrators, and assigns, will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the proprietor of the charge, his heirs, executors, and administrators indemnified against all actions, suits, expenses, and claims on account of the non-payment of the said rent, or any part thereof, or the breach of the said covenants or conditions, or any of them."

For a form negativing this implication, see Form 44, and see note to last section.

The covenants implied under the Conveyancing Act, 1881, s. 7 D, appear to be wider than those under this section, and may be adopted under Rule 99.

Entry by proprietor of charge.

S. 25. "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge may, for the purpose of obtaining satisfaction of any moneys due to him under the charge, enter upon the land charged, or any part thereof, or into the receipt of the rents and profits thereof, subject nevertheless to the right of any persons appearing on the register to be prior incumbrancers, and to the liability attached to a mortgagee in possession."

For a form excluding this section, see Form 44.

Foreclosure by proprietor of charge.

S. 26. "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge may enforce a foreclosure or sale of the land charged, in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money named at the appointed time."

For a form excluding this section, see Form 44.

On obtaining an order for foreclosure absolute the mortgagee can apply to be registered as proprietor of the land under Rule 164, and a new land certificate will be granted under Rule 263.

Where an order for foreclosure absolute of registered land had been obtained on an unregistered mortgage deed and registration of the foreclosure order had been refused, the Court under s. 95 rectified the register by registering the mortgagee as proprietor (*c*).

(*c*) *Weymouth* v. *Davis*, (1908) 2 Ch. 169.

Remedy of proprietor of charge with a power of sale.

S. 27. "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge with a power of sale may, at any time after the expiration of the appointed time, sell and transfer the land on which he has a registered charge, or any part thereof, in the same manner as if he were the registered proprietor of such land."

Under the Act of 1897, s. 9 (2), the provisions of sect. 19 and ancillary sections of the Conveyancing Act, 1881, apply to registered charges, and therefore it would seem only necessary to make an entry under this section where some modification of those provisions is desired.

For the form and procedure of such a sale and the effect of the transfer, see Rule 137 and sects. 8 (4) and 9 (1) of the Act of 1897.

Where a first mortgagee sells under his power of sale the purchaser will be registered free from the second and other charges (*d*).

Priority and discharge of registered charges.

S. 28. "Subject to any entry to the contrary on the register, registered charges on the same land shall as between themselves rank according to the order in which they are entered on the register, and not according to the order in which they are created.

"The registrar shall, on the requisition of the registered proprietor of any charge, or on due proof of the satisfaction thereof, notify on the register in the prescribed manner by cancelling the original entry or otherwise the cessation of the charge, and thereupon the charge shall be deemed to have ceased" (*e*).

See Rules 170 to 173; and for form varying the provisions of this section as to priority, see Form 44.

Under Rule 179 the section applies to sub-charges, and under the Act of 1897, Schedule, it applies to part discharges, but by Rule 175 it does not apply to incumbrances created prior to the first registration of the land.

Transfer of charges on register.

S. 40. "The registered proprietor of any charge may, in the prescribed manner, transfer such charge to another person as proprietor. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred. The registrar shall also, if required, deliver to the transferee a fresh certificate of charge, but the transferor shall be deemed to remain proprietor of such charge, until the name of the transferee is entered on the register in respect thereof. [A registered transferee for value of a charge and his successors in title

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(*d*) *Re Richardson*, L. R. 13 Eq. 142.

(*e*) *Pantlin* v. *Evans* (1911), W. N. 80.

shall not be affected by any irregularity or invalidity in the original charge itself of which the transferee was not aware when it was transferred to him.]"

The manner of transfer is prescribed by Rule 168, Form 49.

The transferee should inquire of the mortgagor as to the state of the mortgage debt, since there is nothing in the Acts which does away with the rule that the amount of a mortgage debt is a matter of account between the parties.

Though not expressly stated, it would seem that the transferee when registered will have the rights of a "registered proprietor" under sects. 23 to 28 of the Act of 1875, and of sect. 9 (2) of the Act of 1897.

The Act of 1897, s. 8 (1), and Rule 259, contemplate the existing certificate being endorsed with a note of the transfer, instead of a fresh certificate being issued as here provided.

The words in square brackets were added by the Act of 1897, which also provides, sect. 7 (4), that any person suffering loss by rectification of the register shall be indemnified.

Transmission on death.

S. 42. "On the death of the sole registered proprietor, or of the survivor of several joint registered proprietors of any charge, the executor or administrator of such sole deceased proprietor, or of the survivor of such joint proprietors, shall be entitled to be registered in his place."

Transmission on bankruptcy.

S. 43. "On the bankruptcy of any registered proprietor of any charge, or on the liquidation of his affairs by arrangement, his trustee shall be entitled to be registered as proprietor in his place. [This section shall not apply until it is certified in the prescribed manner by the Court having jurisdiction in bankruptcy that the charge is part of the property of the bankrupt divisible among his creditors. The official receiver shall be entitled to be registered pending the appointment of a trustee.]"

The words in square brackets were added by the Act of 1897.

Rules 193 to 199 prescribe the procedure on bankruptcy, and contain various provisions supplemental to this section.

Nature of title of registered fiduciary proprietor.

S. 46. "Any person registered in the place of a deceased or bankrupt proprietor shall hold the charge in respect of which he is registered upon the trusts and for the purposes to which the same is applicable by law, and subject to any unregistered estates, rights, interests, or equities, subject to which the deceased or bankrupt proprietor held the same; but, save as aforesaid, he shall, in all respects, and, in particular, as respects any registered dealings with such land or charge, be in the same position as if he had

Chap. VI. taken such land or charge under a transfer for a valuable consideration."

See Rules 183 to 199.

Evidence of transmission of registered proprietorship.

S. 47. "The fact of any person having become entitled to any land or charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, shall be proved in the prescribed manner."

See Rules 183 to 186, 192 as to death, and Rules 193 to 199 as to bankruptcy. The sects. 44, 45 relating to the marriage of female proprietors can hardly have any application now, and no provision is made for them in the rules.

Effect of unregistered dispositions.

S. 49. "The registered proprietor alone shall be entitled to transfer or charge registered land by a registered disposition; but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned.

"The registered proprietor alone shall be entitled to transfer a registered charge by a registered disposition; but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land."

The first schedule to the Act of 1897 provides that "this section includes power to sever the mines and minerals from the surface."

A mortgage or charge under this section may entail upon the mortgagee or his successors in title the liability imposed by sect. 16 (2) of the Act of 1897 (*f*).

Loss and renewal of certificate.

By sects. 78 and 79, if any certificate of charge is lost, mislaid, or destroyed, the registrar, upon being satisfied of the fact, may grant a new certificate of charge in the place of the former one, and, upon the delivery up to him of a certificate of charge, may grant a new one in its place.

(*f*) *Post*, Chap. XLV. Sect. 1 (iv).

Sect. 78 is repealed by the Act of 1897, and is replaced by sect. 8 (3) of that Act.

Certificate to be evidence.

By sect. 80, any certificate of charge shall be *primâ facie* evidence of the several matters therein contained.

Enactments as to registration.

S. 83. "The following enactments shall be made with respect to registration of title:—

Neither the registrar nor any person dealing with registered land or a charge will be affected with notice of a trust, express, implied, or constructive; and references to trusts shall as far as possible be excluded from the register (*g*).

(3.) Upon the occasion of the registry of two or more persons as proprietors of the same land or of the same charge, an entry may be made on the register, to the effect that, when the number of such proprietors is reduced below a certain specified number, no registered disposition of such charge shall be made, except under the order of the Court, or of the registrar after enquiry into title, subject to an appeal to the Court. Subject to general rules, wherever registered land or a charge is to be entered in the names of two or more joint proprietors, the registrar shall make such entry under this sub-section as may be prescribed, unless it is shown to his satisfaction that the joint proprietors are entitled for their own benefit."

The latter part of this section, which was added by the Act of 1897, is considerably modified by Rules 224, 225.

The registration of charges created by companies is provided for by Rule 161.

Fraudulent dispositions.

S. 98. "Subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

It would seem that the provisions as to charges in sects. 22 to 28, and as to transfers of charges in sect. 40, would, where the disposition is in fact for value, be protected under this section.

Incumbent of benefice.

Where the incumbent of a benefice and his successors are the registered proprietors of land no disposition of it can be registered unless a certificate in the prescribed form is obtained, and no lien can be created by deposit of the land certificate (*h*).

(*g*) Act of 1897, s. 14, and Sched. I., replacing sub-sects. 1 and 2 of sect. 83 of Act of 1875. As to registration where money is advanced by two or more persons, see r. 163.

(*h*) Act of 1897, s. 15, rr. 237—239.

Chap. VI.

The provisions with regard to liens created by deposit, or notice of intended deposit of certificates, will be dealt with later (*i*).

The provisions of the Land Transfer Act, 1875, never had any great practical effect; and the Act of 1897 is not only as yet limited to a very small area, but is also limited in its operation within that area (*k*), and consequently the Acts, though dealt with in the present treatise, are not at present of any very great or general importance.

(*i*) *Post*, p. 75.

(*k*) There is no compulsion to register except on the first sale after the Act of 1897 has become applicable: *Capital and Counties Bank* v. *Rhodes*, (1903) 1 Ch. 631, per Cozens-Hardy, L. J.

CHAPTER VII.

EQUITABLE MORTGAGES.

SECTION I.

THE DIFFERENT MODES BY WHICH AN EQUITABLE MORTGAGE MAY BE CREATED.

AN equitable mortgage to secure a past debt or a present advance may be made :—

Mortgage of equity of redemption.

(1.) By a formal mortgage of the equity of redemption in property, when the legal estate is vested in a prior mortgagee.

Agreement for mortgage.

(2.) By an agreement or any charge or other writing, however informal, which indicates with sufficient certainty the intention to create a mortgage security, provided that in the case of land such agreement or charge is sufficient to satisfy the requirements of the Statute of Frauds.

Deposit of deeds.

(3.) By a deposit with the creditor of deeds, copies of court rolls, or other documents of title, either with or without a memorandum of charge, by way of security for payment of the debt or loan.

Further advances.

An equitable mortgage may be given to secure a present loan and future advances (*a*).

Legal estate outstanding.

An equitable mortgagee may, in a proper case, obtain an injunction restraining the mortgagor from parting with the legal estate, if not already outstanding (*b*).

(*a*) *Exp. Heathcoat*, 1 Fonbl. Bky. 42.

(*b*) *London and County Bank* v. *Lewis*, 21 Ch. D. 490.

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SECTION II.

OF A MORTGAGE OF AN EQUITY OF REDEMPTION.

Nature of equity of redemption.

i. –Nature and Incidents of Mortgage of Equity of Redemption.—An equity of redemption is, as will be seen hereafter (*c*), an estate or interest of which the mortgagor, until decree of foreclosure, is possessed of his ancient and original right, and accordingly may be the subject of mortgage *toties quoties*.

First mortgagee paid off is trustee of legal estate for subsequent incumbrancers.

Where successive mortgages are made of an equity of redemption, subject to a prior legal mortgage, the first mortgagee, on being paid off, becomes a trustee of the legal estate for any subsequent incumbrancers according to their priorities, and is accordingly bound to convey the estate to the second mortgagee, who has the best right to call for it: he must not convey the estate to a subsequent mortgagee so as to alter the priorities of successive equitable incumbrancers (*d*). A mortgagee is not, subject to his security, a trustee of the legal estate for the mortgagor (*e*).

Action to compel conveyance of legal estate.

A second mortgagee may, upon the first mortgagee being paid off by the mortgagor, bring an action to obtain a conveyance or assignment of the legal estate, although an actual tender has been made to him by the mortgagor of the money due on the second mortgage, and even although a decree for redemption has been obtained, until the time fixed by the decree for redemption has arrived, though such a course will probably fix him with costs, if the mortgagee has had his proper notice of six months before tender made (*f*).

Disadvantages of mortgages of equity of redemption.

A loan on the security of a mortgage of an equity of redemption is attended with certain serious risks and disadvantages.

As between mere equitable incumbrancers, it is a maxim in equity—*qui prior est tempore, potior est jure* (*g*). On this principle each mortgagee of the equity of redemption has preference according to his priority in time (*h*).

(*c*) See *post*, p. 649.

(*d*) *Sharples* v. *Adams*, 32 Beav. 212.

(*e*) *Taylor* v. *Russell*, (1892) A. C. 244, per Lord Herschell.

(*f*) *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119.

(*g*) *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Wilmott* v. *Pike*, 5 Ha. 14; *Jones* v. *Jones*, 8 Sim. 633. And see *Wiltshire* v. *Rabbits*, 14 Sim. 76; *Rooper* v. *Harrison*, 2 K. & J. 100; *Lee* v. *Howlett*, 2 K. & J. 531; *Consolidated, &c. Co.* v. *Riley*, 1 Giff. 371.

(*h*) See *post*, Chap. LV. Sect. 3 (ii).

Liability to be postponed to subsequent incumbrancer who gets in the legal estate.

But there is another important principle that must be borne in mind, viz., that where equities are equal, the law must prevail. The consequence is, that a mortgagee of the equity of redemption may be postponed to a subsequent mortgagee, who, having advanced his money without notice, afterwards (although then with notice) obtains possession of the legal estate. From this results a disadvantage and even danger in taking a mortgage of an equity of redemption, against which it is difficult to guard.

Liability to be ousted by tacking.

Another disadvantage attending a mortgage of an equity of redemption is, that the first mortgagee may, previously to the second mortgage, or even subsequently to it if without notice, make further advances to the mortgagor, all of which (as also judgment debts) (*i*), he will, as hereafter explained (*k*), be entitled to tack to his original mortgage in preference to the subsequent mortgagee. To guard against this mischief, it is incumbent on a person lending money on an equity of redemption, first to make inquiry of the prior mortgagee into the amount of his demand and inspect the title deeds in his possession, and, secondly, to give him express notice of the proposed mortgage. And it will be advisable, if practicable, *i.e.*, if the first mortgagee will permit, to put notice of the second mortgage on the principal title deed, such as the conveyance to the mortgagor or the like, or on the first mortgage deed; for otherwise the mortgagor might redeem the first mortgage, and convey the legal estate to a stranger without notice, who would thus gain a preference to the prior equitable mortgagee.

No remedy at law for enforcing charge.

A further disadvantage is, that the mortgagee has not the legal remedy, so far as respects the estate, for enforcing payment of principal or interest, by bringing an action against the mortgagor or his tenant for recovery of possession of the mortgaged property, now substituted for the old action of ejectment, but is driven to seek relief in equity.

Liability to foreclosure by legal mortgagee.

Again, inasmuch as a second mortgagee is subject to foreclosure equally with the mortgagor at the hands of the first mortgagee, a mortgagee of an equity of redemption may find himself obliged, in order to preserve his security, to redeem the first mortgagee, and so be compelled to advance a larger sum

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(*i*) *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491.

(*k*) See *post*, pp. 1248 *et seq.*

than he had originally contemplated, or perhaps than he may then be prepared to lend.

Liability to consolidation by legal mortgagee.

Or, upon proceeding to foreclose, the first mortgagee may possibly be in a position to consolidate his mortgage with mortgages upon other property of the mortgagor (*l*), in which case the mortgagee of the equity of redemption will have to provide for a still greater outlay in order to preserve his security, and will also be exposed to the risk of losing his security entirely, should such other property of the mortgagor prove to be an inadequate security for the mortgages made upon it.

No right to title deeds.

A further disadvantage is that a mortgagee of an equity of redemption is not entitled to the title deeds to the property mortgaged, which follow the legal estate into the hands of the first mortgagee. On this account, in the absence of the precaution above suggested, a mortgagee of an equity of redemption is constantly subjected to the risk of being postponed to a stranger obtaining the legal estate from the first mortgagee without such notice of that charge as would be imputed to a person taking such conveyance without requiring the title deeds to be handed over, or their absence accounted for (*m*).

Fraudulent concealment of prior incumbrance.

Another disadvantage, against which no prudence can guard, is, that the mortgagor may secretly have executed prior mortgages of the equity. For so gross a fraud the legislature has enacted that his right of redemption shall be utterly lost. By the statute 4 & 5 Will. III. c. 16, it is, in effect, enacted that if any person shall mortgage any lands, and again mortgage the same lands or any part thereof to another mortgagee, and shall not discover the first mortgage to the second mortgagee, he shall have no equity of redemption against the second mortgagee, who may hold the mortgaged lands free from such equity, as if he had acquired them by absolute purchase (*n*).

It will be seen that the language of the statute is confined to a second mortgage *of the same lands*, and that the legislature does not appear to have contemplated that other estates might be also comprised in the second mortgage. To such cases it has been held, in *Stafford* v. *Selby* (*o*), that the statute, being penal, does not apply, unless the property joined with the equity of redemp-

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(*l*) See *post*, Chap. XLIII., as to consolidation.

(*m*) See *post*, Chap. LVIII. sect. 3.

(*n*) *James* v. *Kerr*, 40 Ch. D. 449.

(*o*) 3 Vern. 589.

tion is so inconsiderable that its introduction into the mortgage was palpably fraudulent, and for the mere purpose of affording a pretext for the evasion of the statute.

The same case also determined that, to comply with the directions of the statute, the mortgagor must give the second mortgagee notice in writing under his hand of all the prior incumbrances; and that an assignee of the second mortgage, as well as a subsequent mortgagee redeeming the second mortgage, has the benefit of the statute; but that to entitle a second mortgagee to the advantage of the statute, he must come into Court with clean hands and free from fraud.

The statute does not give a right to the second mortgagee to come actively into Court to enforce the forfeiture; and in order to bring the Act into operation, both the first and second mortgages must be, in the strictest sense, mortgages reserving a right of redemption (*p*). The forfeiture will not arise so long as there is a legal right to redeem, but only after the stipulated time for redemption has passed, and therefore the equity of redemption alone remains (*q*).

Liability of mortgagor or his solicitor to criminal proceedings.

By a more recent statute (*r*), it is enacted that any seller or mortgagor, or the solicitor or agent of such, who conceals any settlement, deed, will, or other instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or who falsifies any pedigree on which the title does or may depend in order to induce him to accept the title, with intent to defraud, is guilty of misdemeanour, and also liable to an action for damages at the suit of the purchaser or mortgagee; but no prosecution is to be commenced without the sanction of the Attorney-General, or, if that office be vacant, of the Solicitor-General. This section, it is conceived, can only apply to the fraudulent concealment of an *existing* incumbrance, nor will the vendor's solicitor be criminally responsible if he suppress a mere equitable charge, which has been satisfied, or which no longer affects the title (*s*).

Where there is a condition of sale that no title to the property sold shall be shown before a certain date, *semble*, that the above Acts do not apply to the omission of an incumbrance prior to

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(*p*) *Kennard* v. *Futvoye*, 2 Giff. 81. See *Clark* v. *Hoskins*, 15 W. R. 1161.

(*q*) Dav. Conv. (4th ed.) Vol. II. pt. ii. p. 5.

(*r*) 22 & 23 Vict. c. 35, s. 24, as amended by 23 & 24 Vict. c. 38, s. 8.

(*s*) Dart, V. & P. (7th ed.) Vol. I. p. 338.

that date (*t*). But there is no fraudulent concealment of a claim when the person is under no obligation to disclose it, as a witness under examination (*u*).

Liability in equity.

Independently of statutory enactment, a mortgagor or his solicitor, who fraudulently conceals an incumbrance on the property which is known to him, is liable in equity to a subsequent mortgagee or purchaser (*x*).

Where the existence of a legal mortgage was concealed by the mortgagor from a purchaser for value, it was held that the mortgagee was entitled to a decree of foreclosure against the purchaser, and that the latter could not avail himself of a reconveyance to the mortgagor, which, having been obtained by fraud, was declared null and void (*y*).

Where an incumbrance has been omitted from an abstract by the vendor, though through ignorance, he must pay it off, and cannot rescind the contract under the clause enabling the vendor to rescind if he declines to comply with any requisition (*z*).

On the same principle, false or incorrect representations as to incumbrances must be made good, as where the representative of a mortgagor asserted that part of the mortgage had been transferred to other property (*a*). But where the representation is made by a stranger he cannot be compelled to make good the loss where no fraud was intended (*b*).

Disadvantages of mortgage of reversion expectant on mortgage term.

ii.—Mortgage of Reversion expectant on Mortgage Term.—A legal reversion expectant on a mortgage term must not be confounded with an equity of redemption. A mortgage in fee, therefore, after a mortgage for a term of years, will, of course, take precedence of mere equitable incumbrances upon the term. But even to a mortgage of such a nature, without some degree of precaution, a degree of hazard attaches, for the first mortgagee may continue to make advances to the mortgagor after the date of the mortgage in fee, either on his original security, or on

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(*t*) *Smith* v. *Robinson*, 13 Ch. D. 148.

(*u*) *Rolt* v. *White*, 3 De G. J. & S. 360.

(*x*) *Arnot* v. *Biscoe*, 1 Ves. Sen. 94; *Evans* v. *Bicknell*, 6 Ves. 174; *Richards* v. *Barton*, 1 Esp. 268. See *Edgington* v. *Fitzmaurice*, 39 Ch. D. 459, C. A. (liability of directors of joint stock company).

(*y*) *Heath* v. *Crealock*, L. R. 10 Ch. 22.

(*z*) *Re Jackson and Oakshott*, 14 Ch. D. 851.

(*a*) *Att.-Gen.* v. *Cox*, 3 H. L. C. 240.

(*b*) *Low* v. *Bouverie*, (1891) 3 Ch. 82, C. A.

judgment or statute security; all of which he will be entitled to tack, unless he had notice of the second mortgage; and even a subsequent mortgagee of the mere equity of redemption might obtain an advantage over the mortgagee of the legal reversion by procuring an assignment of the first mortgage, to which he might tack his equitable charge if he had not notice of the intervening mortgage at the time of advancing his money. To guard against the first of these dangers, it is proper for the mortgagee of the legal reversion to make the like inquiries of the mortgagee of the term, and to give him the like notice, as above mentioned, in the case of a mortgage of the equity of redemption. And against the second danger, the notice to the first mortgagee might be of service (*c*).

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SECTION III.

OF AGREEMENTS FOR MORTGAGES.

Agreement to borrow or lend not specifically enforceable.

i.—As to Specific Performance, &c. of Agreements for Mortgages.—Specific performance will not be enforced of a mere agreement either to borrow (*d*) or to lend (*e*) on mortgage so long as it remains executory, without any performance of the terms of the agreement by either the lender or the borrower.

The rule applied to a contract to lend to a company money payable by instalments upon the security of debentures to be issued by the company; and if the lender made default, the unpaid instalments did not constitute a debt, and the company were only entitled to damages for the actual loss caused by breach of contract (*f*). But now by the Companies Act, 1908 (*g*), a contract to take debentures may be enforced by an order for specific performance.

Consideration for security.

The mere existence of an antecedent debt is not of itself a valuable consideration for a security. To constitute valuable

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(*c*) Coote on Mortgages (5th ed.), Vol. I. pp. 411, 412.

(*d*) *Rogers* v. *Challis*, 27 Beav. 175; *Chinnock* v. *Sainsbury*, 6 Jur. N. S. 1318.

(*e*) *Sichel* v. *Mosenthal*, 30 Beav. 371; *Larios* v. *Gurety*, L. R. 5 P. C. 346. See *Hunter* v. *Langford*, 2 Moll. 272; *Starkey* v. *Barton*, (1909) 1 Ch. 284.

(*f*) *South African Territories* v. *Wallington*, (1898) A. C. 309.

(*g*) 8 Edw. 7, c. 69, s. 105.

consideration for the giving of a security there must be not only an existing debt, but an agreement, express or implied, to give time or some other consideration, or the security must be communicated to the creditor, and he must in fact forbear on the strength of it to sue for the debt (*h*).

Specific performance of agreement to secure past debts.

Where there is such consideration the Court will specifically enforce an agreement to give security for a past debt (*i*), or for money actually advanced before or at the time of the agreement (*k*), unless the borrower is prepared to pay off the money. Such an agreement, however, if it relates to land, is within the Statute of Frauds, and, except in the case of a deposit of deeds (*l*), must be evidenced by a sufficient memorandum in writing to satisfy the Act (*m*). But if the agreement is to give security on personalty, it is not within the statute (*m*); and an oral agreement on such security would, apparently, be capable of being enforced, if for an antecedent debt, or if followed by an actual advance on the faith of the agreement by the mortgagee.

So, specific performance was decreed of an agreement to give a mortgage to secure money to be lent, where part had been already advanced (*n*).

But an agreement to give security will not be allowed to have legal effect if its performance is postponed until a question of fraudulent preference arises (*o*).

Foreign land.

A contract to give a mortgage on foreign land must be perfected according to the *lex situs*, but it must be treated as an English mortgage subject to the rights and equities incident to a mortgage (*p*).

Extension of charge to future advances.

Where an equitable charge has been created by agreement in writing for a mortgage, or by deposit of deeds or otherwise, to secure an existing debt, the charge may, by verbal agreement, be held by the mortgagee as a security for further advances (*q*).

(*h*) *Wigan* v. *English and Scottish Law Life Ass. Assn.*, (1909) 1 Ch. 291.

(*i*) *Alliance Bank* v. *Broom*, 2 Dr. & Sm. 289; *Carew* v. *Arundell*, 8 Jur. N. S. 71; *Hermann* v. *Hodges*, L. R. 16 Eq. 18; *Jones* v. *Greatwood* and *Makin* v. *Hughes*, cited Seton, 2042.

(*k*) *Exp. Jones*, 4 D. & C. 750; *Ashton* v. *Corrigan*, L. R. 13 Eq. 76; *Hermann* v. *Hodges*, L. R. 16 Eq. 18. And see *Parish* v. *Poole*, 53 L. T. 35.

(*l*) See *post*, pp. 67 *et seq.*

(*m*) 29 Car. II. c. 3, s. 4. See *Exp. Broderick, Re Beetham*, 18 Q. B. D. 766. C. A.; and per Romilly, M.R., in *Rogers* v. *Challis*, 27 Beav. at p. 178.

(*n*) *Hunter* v. *Lord Langford*, 2 Moll. 272. And see *Pegge* v. *Neath District Tramways*, (1898) 1 Ch. 183.

(*o*) *Re Jackson and Bassford*, (1906) 2 Ch. 467.

(*p*) *British South Africa Co.* v. *De Beers Mines*, (1910) 2 Ch. 502; reversed on another point, (1912) A. C. 52.

(*q*) *Exp. Heathcoat*, 1 Fonb. Bky. 42; *Baynard* v. *Woolley*, 20 Beav. 583, 586.

Tacking.

But a verbal agreement that a simple contract debt shall be tacked to a subsisting legal mortgage of land is void under the Statute of Frauds (*r*).

Covenant to appoint to creditor.

Where the donee of a general testamentary power covenants, in consideration of money lent, to exercise the power giving the lender a first charge on the fund, and does so, the lender does not thereby obtain a charge on the fund, but only a right to damages (*s*).

Damages for breach of agreement for loan.

Damages may be recovered for a breach of an agreement to lend on mortgage in respect of the expenses actually incurred of the abortive loan, but not, apparently, extending to consequential injury (*t*).

In equity, damages could not have been recovered for the breach of such an agreement, under 21 & 22 Vict. c. 27, inasmuch as the plaintiff would have had no case for specific performance at the time of issuing his writ (*u*); but under the Judicature Act, 1873 (*x*), an action can now be brought in the alternative, either for specific performance or damages (*y*); and the plaintiff will be entitled to damages, even though there may have been no such performance as to render the agreement enforceable (*z*).

Costs of abortive transaction.

An agreement is often made by the borrower to pay the lenders, if the loan goes off, reasonable costs, which will not include banker's commission or costs of remittance; nor, apparently, the costs of realizing securities for the purpose of making the advance, unless such matters are expressly provided for (*a*). Nor will such an agreement entitle the intending mortgagee to interest or compensation for money lying idle pending the completion of the mortgage (*b*).

A covering deed for securing debentures which were never issued is not a completed mortgage within the Solicitors' Remuneration Act, 1881, and therefore the scale fee cannot be charged "for preparing and completing mortgage" (*c*).

(*r*) *Exp. Hooper*, 1 Mer. 7.

(*s*) *Re Lawley*, *Zaiser* v. *L.*, (1902) 2 Ch. 799, C. A.; aff. *sub nom. Beyfus* v. *Lawley*, (1903) A. C. 411.

(*t*) *Duckworth* v. *Ewart*, 10 Jur. N. S. 214; *South African Territories* v. *Wallington*, (1898) A. C. 309.

(*u*) *Rogers* v. *Challis*, 27 Beav. 175.

(*x*) 36 & 37 Vict. c. 66, s. 24.

(*y*) See Ord. XX. r. 6.

(*z*) See *Fritz* v. *Hobson*, 14 Ch. D. 542.

(*a*) *Re Blakesley*, 32 Beav. 379.

(*b*) *Sweetland* v. *Smith*, 1 Cr. & M. 585.

(*c*) *Re Bircham*, (1895) 2 Ch. 786, C. A.

Quære whether a mortgage for future advances is a completed mortgage (*d*).

Preliminary expenses.

In the absence of contract, the proposed lender has no claim against the borrower for the preliminary expenses (*e*). It is clear that the solicitor of the lender has no such claim against the borrower (*f*). But where the mortgage of an infant's estate in Chancery goes off, without any default of the mortgagee, the Court allows his expenses of investigating the title (*g*).

An agreement for a mortgage should always provide for the payment of the preliminary expenses by the mortgagor, and should expressly include any special expenses which may be incurred in connection with the advance.

Informal agreement for mortgage may create immediate equitable charge.

ii. -As to Agreements operating as Equitable Mortgages.—Any agreement in writing and properly signed, however informal, by which any property, real or personal, is to be a security for a sum of money owing or advanced, is a charge, and amounts to an equitable mortgage. Thus an agreement that a creditor shall hold land at a fair rent, to be retained in satisfaction of the debt, is in the nature of a mortgage, and will be supported (*h*). So an informal document, signed by a trustee, admitting a breach of trust, with these words, "holding the deeds of my house and policies of assurance as a collateral security" (*i*). So an option to call at any time for a specific amount of debentures of a given issue in satisfaction of a debt is a good equitable security while the issue remains unexhausted (*k*).

Covenant to charge land.

An express covenant or agreement in writing to make a mortgage, in consideration of an actual advance made at the time of the agreement, is sufficient, on the principle of equity that what has been agreed to be performed shall be performed in specie, and creates a specific charge as against simple contract creditors (*l*). A covenant for good

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(*d*) *Re Bircham*, (1895) 2 Ch. 786, C. A.

(*e*) *Melbourne* v. *Cottrell*, 29 L. T. 293; *Holborrow* v. *Lloyd*, 5 Jur. N. S. 114, pt. 2.

(*f*) *Rigley* v. *Daykin*, 2 Y. & J. 83; *Wilkinson* v. *Grant*, 18 C. B. 319.

(*g*) *Craggs* v. *Grey*, 35 Beav. 166.

(*h*) *Morony* v. *O'Dea*, 1 Ba. & Be. 109.

(*i*) *Baynard* v. *Woolley*, 20 Beav. 583.

(*k*) *Pegge* v. *Neath District Tramways*, (1898) 1 Ch. 183.

(*l*) *Hankey* v. *Vernon*, 2 Cox, 12, 14; *Burn* v. *Burn*, 3 Ves. 582; *Matthews* v. *Cartwright*, 2 Atk. 347. See also *Meux* v. *Smith*, 11 Sim. 410; *Tebb* v. *Hodge*, L. R. 5 C. P. 73.

consideration to charge or convey particular lands, or all the present estates of the covenantor, or estates over which he has a power (*m*); or such as he may hereafter acquire of a specified kind, or as may be derived from a specified source (*n*); or lands which he may acquire at any time, will create a charge on that property (*o*); and lands which the covenantor had then purchased and paid for, but the conveyance of which was afterwards obtained, were held to fall within the covenant (*p*); so also, if he, in a subsequent instrument, point out particular lands (*q*), or has acquired lands for the purpose of the charge (*r*).

A covenant that land settled under a marriage contract was of a certain yearly value, was held to be a charge on the real estate of the covenantor (*s*); so an agreement by a mortgagee, a solicitor, to charge a mortgage which he afterwards sold, was held to be a charge on the purchase-money of the mortgage which he had invested to secure a part of the mortgage (*t*); so a covenant to settle or charge lands of a certain value by a certain time will bind even after-purchased lands which belong to the covenantor at that time (*u*); and the parties entitled to the benefit of the covenant will take vested interests, though they die before the time fixed for the performance of the covenant (*x*). So a covenant to settle or charge all lands to be acquired during a certain time (*y*).

What agreements and instruments

A written instrument, promising to pay a sum of money with interest "out of the estate of the deceased W. H.," and signed

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(*m*) *Smith* v. *Smith*, 1 Y. & C. Ex. 338; *Priddy* v. *Rose*, 3 Mer. 86; *Woodyatt* v. *Gresley*, 8 Sim. 180. And see *Burridge* v. *Rowe*, 1 Y. & C. C. C. 583; *Williams* v. *Lucas*, 2 Cox, 160. See *Kennedy* v. *Daly*, 1 Sch. & L. 355; *Carpenter* v. *Carpenter*, 1 Vern. 440; *Eustace* v. *Keightley*, 4 Bro. P. C. 588; *Fothergill* v. *Fothergill*, 2 Freem. Ch. 256; *Freemoult* v. *Dedire*, 1 P. Wms. 429; *Ravenshaw* v. *Hollier*, 7 Sim. 3; *Legard* v. *Hodges*, 1 Ves. Jun. 477; *Eyre* v. *McDowell*, 9 H. L. C. 619.

(*n*) *Metcalfe* v. *Archb. York*, 1 My. & Cr. 547; *Lyde* v. *Mynn*, 1 My. & K. 683.

(*o*) *Lyster* v. *Burroughs*, 1 Dr. & Wal. 149; *Stack* v. *Royse*, 12 Ir. Ch. 246.

(*p*) *Warde* v. *Warde*, 16 Beav. 103. But see *Gardner* v. *Marq. Townshend*, Geo. Coop. 301.

(*q*) *Watson* v. *Sadleir*, 1 Moll. 585.

(*r*) *Wellesley* v. *Wellesley*, 4 My. & Cr. 561. See *Mornington* v. *Keane*, 2 De G. & J. 311.

(*s*) *Probert* v. *Morgan*, 1 Atk. 440. See *Parker* v. *Harvey*, 4 Bro. P. C. 604; *Glegg* v. *Glegg*, 4 Bro. P. C. 614.

(*t*) *Exp. Rogers*, 8 De G. M. & G. 271.

(*u*) *Deacon* v. *Smith*, 3 Atk. 323; *Roundell* v. *Breary*, 2 Vern. 483, explained and corrected in *Mornington* v. *Keane*, 2 De G. & J. 292, at p. 315; *Lyde* v. *Mynn*, 1 My. & K. 683. See *Thompson* v. *Cohen*, L. R. 7 Q. B. 527; *Wellesley* v. *Wellesley*, *sup.*; *Tooke* v. *Hastings*, 2 Vern. 97; *Needham* v. *Smith*, 4 Russ. 318; *Prebble* v. *Boghurst*, 1 Swanst. 321; *Tew* v. *Earl of Winterton*, 3 Bro. C. C. 493; *Pitt* v. *Jackson*, 2 Bro. C. C. 51, cannot be relied on.

(*x*) *Nayler* v. *Wetherell*, 4 Sim. 114.

(*y*) *Lewis* v. *Madocks*, 17 Ves. 48; *Wethered* v. *Wethered*, 2 Sim. 183.

will create an equitable mortgage.

by all the persons interested in his estate, has been held to constitute (the personalty being exhausted) an equitable mortgage on the real estate (*z*). Similarly a letter to the executor by a debtor to an estate, saying that he might retain the debtor's title deeds till the latter got the whole of his affairs settled with the executors (*a*). So a memorandum by a husband to charge all his interest in the future property of his wife (*b*). So a letter undertaking to deposit deeds as security for an overdrawn banking account (*c*). So an agreement that the plaintiff should let and manage a farm and retain out of the proceeds sums advanced by him to the owner (*d*). But a covenant by the donee of a testamentary power to appoint a fund in consideration of money lent does not give the lender a charge on the fund (*e*).

Receivership deed.

Where a tenant for life of real estate covenanted on the marriage of his daughter to pay her an annuity, and in order to secure the same appointed a receiver of the rents and profits of the land, it was held that the deed created a valid equitable charge upon the land (*f*).

Power of attorney.

A power of attorney, authorizing a party to take possession of lands and hold them until paid a certain sum, amounts to a contract to charge, and is not revoked by the death of the grantor (*g*). A power of attorney may authorize the execution of a mortgage, though, as between the donor and donee of the power, the mortgage is unauthorized (*h*).

Right of entry and sale, &c.

A covenant that if payment be not made the creditor may, by entry, foreclosure, sale, or mortgage, levy the amount from the lands of the debtor, is an equitable mortgage (*i*).

Declaration of trust.

A letter or memorandum given by a solicitor to his client stating that a sum of money entrusted to the solicitor for invest-

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(*z*) *Suart* v. *Toulmin*, 2 Pow. Mtg. 1049 b, ed. 6.

(*a*) *Fenwick* v. *Potts*, 8 De G. M. & G. 506.

(*b*) *Carew* v. *Arundell*, 8 Jur. N. S. 71.

(*c*) *Fullerton* v. *Provincial Bank of Ireland*, (1903) A. C. 309.

(*d*) *Coonan* v. *O'Connor* (1903), 1 Ir. R. 449.

(*e*) *Re Lawley*, *Zaiser* v. *L.*, (1902) 2 Ch. 799, C. A.; aff. *sub nom. Beyfus* v. *Lawley*, (1903) A. C. 411.

(*f*) *Cradock* v. *Scottish Provident Institution*, W. N. (1894) 88; 70 L. T. 718, C. A.

(*g*) *Spooner* v. *Sandilands*, 1 Y. & C. C. C. 390; *Abbott* v. *Stratten*, 3 J. & L. 603; *Walsh* v. *Whitcomb*, 2 Esp. 565; *Gaussen* v. *Morton*, 10 B. & Cr. 731; *Bennett* v. *Cooper*, 9 Beav. 252; *Coonan* v. *O'Connor* (1903), 1 Ir. R. 449.

(*h*) *Davy* v. *Waller*, 81 L. T. 107.

(*i*) *Eyre* v. *McDowell*, 9 H. L. C. 620; *Hodgson's Case*, 1 G. & J. 13; *Stuart's Case*, 2 Sch. & Lef. 381; *Exp. Jones*, 4 D. & C. 750; *Re Parkinson*, 13 L. T. 26; *Tebb* v. *Hodge*, L. R. 5 C. P. 73.

ment was in his hands at interest, being part of a sum advanced to P. on security of freeholds at K., was held, no such mortgage having, in fact, ever been made, to create a valid equitable charge on the share of the solicitor in the proceeds of sale of lands at K., which he and P. had purchased for resale as a joint adventure (*k*).

Receipt.

Where a relation paid off a mortgage and took a receipt from the mortgagee, he undertaking to reconvey, it was held an equitable mortgage (*l*).

Conditional agreement to postpone security.

So, a parol agreement for a mortgagee to give up his security to a new mortgagee paying off a part of the mortgage, on the understanding that he was to have a second mortgage for the residue, was held to create a valid second mortgage (*m*).

Recitals.

Also a recital of the obligor of a bond for 3,000*l*., that, on the execution of a will of real estate in his favour, he had promised to provide for the obligee, was held to have created a lien on the real estate for the 3,000*l*. (*n*). Similarly, a recital in an assignment of rent reserved by a lease to a creditor, but in which no further interest in the lease was conveyed, that a security was intended, was held to be an equitable charge on the lease, and entitled the creditor to insist on a legal mortgage (*o*).

Agreement to execute mortgage on demand.

An agreement to execute on demand a mortgage of lands on failure to pay notes or bills when due, was held to create an immediate equitable mortgage of the lands for the amount of notes and bills unpaid at maturity, the words "on demand" having reference to the execution of a legal mortgage (*p*).

Effect given to agreement notwithstanding mistake, &c.

Effect will be given to an intention to create a security, notwithstanding any mistake in the manner of making it (*q*); and securities will take effect according to the intention of the parties, both as to the quantity of the property charged, and the extent of the mortgagor's interest in it (*r*).

Parol evidence.

The intention of the parties as regards the terms and extent of the security may be established by parol evidence (*s*).

(*k*) *Re Crowdy, Burgess* v. *Crowdy*, 46 L. T. 71. See also *Middleton* v. *Pollock, Exp. Wetherall*, 4 Ch. D. 49.

(*l*) *Fenwick* v. *Potts*, 8 De G. M. & G. 506.

(*m*) *Banks* v. *Whittall*, 1 De G. & S. 536; *Beckett* v. *Cordley*, 1 Bro. C. C. 353.

(*n*) *Exp. Atkins*, 2 Y. & C. Ex. 536.

(*o*) *Exp. Wills*, 1 Ves. Jun. 162.

(*p*) *Re Hurley's Estate*, (1894) 1 Ir. R. 488.

(*q*) *Re Strand Music Hall Co.*, 3 De G. J. & S. 147; *Exp. Rogers, Re Selby*, 8 De G. M. & G. 271.

(*r*) *Wainwright* v. *Hardisty*, 2 Beav. 363; *Grieveson* v. *Kirsopp*, 5 Beav. 283; *Woodburn* v. *Grant*, 22 Beav. 483.

(*s*) *Banks* v. *Whittall*, 1 De G. & S. 536. See *Beckett* v. *Cordley*, 1 Bro.

Where in an equitable agreement a charge was stated to be on three houses in a certain lease, which only, in fact, comprised one house, evidence was admitted to explain the mistake (*t*).

Misrepresentation.

A memorandum of charge by a solicitor on a mortgage debt, misrepresented as existing, was held an equitable mortgage upon an indemnity fund set apart when the mortgage was paid off (*u*).

Effect given to defective assurances, &c.

An ineffectual attempt to make a legal mortgage which fails for want of some formality, as inrolment, or (formerly) presentment of a surrender of copyholds, is valid as an equitable charge, and gives the mortgagee a right to a perfected assurance (*x*). So a power or warrant of attorney to confess judgment in ejectment, which proved defective as such, was held to create a valid equitable charge (*y*).

Undertaking to hold deeds as security.

An acknowledgment of a debt with an undertaking to hold the deeds of a house as security, was held an equitable charge on the house (*z*).

Agreement for legal mortgage.

An agreement for a legal mortgage means a first mortgage not only in the case of land, but, by analogy, in the case of a ship (*a*).

A third party who pays off a legal mortgage has *primâ facie* a better right than the mortgagor to call for the legal estate, and the mere fact that the mortgagor executes in favour of the third party a memorandum of equitable charge containing an agreement to give a legal mortgage when called upon does not abrogate this *primâ facie* right (*b*).

Power of sale.

An agreement to give a mortgage with an immediate power of sale will be enforced (*c*).

Statutory powers of sale, &c.

An agreement under seal to give a legal and proper mortgage with a power of sale, will import into the security the statutory powers of sale for the time being in force, and such powers will be exerciseable though no legal mortgage has been executed (*d*).

C. C. 853; *Exp. Atkins*, 2 Y. & C. Ex. 536.

(*t*) *Re Boulter, Exp. Nat. Prov. Bank of England*, 4 Ch. D. 241.

(*u*) *Exp. Rogers, Re Selby*, 8 De G. M. & G. 271.

(*x*) *Mestaer* v. *Gillespie*, 11 Ves. 626; *Taylor* v. *Wheeler*, 2 Salk. 449.

(*y*) *Dale* v. *Southwick*, 2 Vern. 151.

(*z*) *Baynard* v. *Woolley*, 20 Beav. 583.

(*a*) *Thompson* v. *Clark*, 1 N. R. 19.

(*b*) *Crosbie Hill* v. *Sayer*, (1908) 1 Ch. 866.

(*c*) *Ashton* v. *Corrigan*, L. R. 13 Eq. 76; *Hermann* v. *Hodges*, L. R. 16 Eq. 18.

(*d*) *Re Solomon and Meagher's Contract*, 40 Ch. D. 508.

Special provisions.

Where an agreement for a mortgage contains a stipulation that the principal shall not be called in for a certain time, a condition will be implied that the forbearance to call in the money shall depend upon punctual payment of the interest, and, if the property be leasehold, on performance and observance by the mortgagor of the covenants of the lease, and the Court will compel the mortgagor to execute a legal mortgage on those terms (*e*).

An agreement to give a mortgage *simpliciter* will authorize the insertion of a power of sale in the mortgage deed, so as to prevail against a mesne assignee of the equity of redemption taking the legal estate, who will be a trustee thereof for the purchaser from the mortgagee under the power (*f*).

An agreement to give a legal mortgage in such form and containing such stipulations as the mortgagee shall require, will not enlarge the subject-matter of the charge, but will only impose on the mortgagor the obligation to perfect the charge (*g*). Thus it will not entitle the mortgagee to a legal mortgage excluding the operation of sect. 17 of the Conveyancing Act, so as to give him the right of consolidation (*h*).

Costs of perfecting equitable charge.

The mortgagor must bear the costs of perfecting an equitable security by conveyance, or, in the case of copyholds, by procuring himself to be admitted, if necessary, and by surrendering to the mortgagee, including fines and fees (*i*).

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SECTION IV.

MORTGAGE BY DEPOSIT OF TITLE DEEDS.

Statute of Frauds.

i.—Nature and Incidents generally of a Mortgage by Deposit.—The Statute of Frauds enacts (*k*) that no "action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless

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(*e*) *Seaton* v. *Twyford*, L. R. 11 Eq. 591.

(*f*) *Leigh* v. *Lloyd*, 2 De G. J. & S. 330.

(*g*) *Whitley* v. *Challis*, (1892) 1 Ch. 64, C. A.

(*h*) *Farmer* v. *Pitt*, (1902) 1 Ch. 954.

(*i*) *Pryce* v. *Bury*, 2 Drew. 41, affirmed 18 Jur. 967. See L. R. 16 Eq. 153, n.

(*k*) 29 Car. II. c. 3, s. 4.

the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Agreement for mortgage of land must be in writing.

As a general rule, therefore, an agreement to give a mortgage on lands, tenements, or hereditaments of any tenure, or on any interest in or concerning them, to secure a debt or advance, must be in writing and signed by the intending mortgagor or his agent.

Exception as to mortgages by deposit of deeds.

But to this rule there is an important exception. A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently due, or a sum of money advanced at the time of the deposit, operates as an equitable mortgage or charge, by virtue of which the depositee acquires, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself. A mere delivery of the deeds will have this operation without any express agreement, whether in writing or oral, as to the conditions or purpose of the delivery, as the Court would infer the intent and agreement to create a security from the relation of debtor and creditor subsisting between the parties, unless the contrary were shown; and the delivery would be sufficient part performance of such agreement to take the case out of the statute (*l*).

As to copyholds.

A deposit of copies of court rolls will have the same effect in the case of copyholds (*m*).

Where, therefore, a sale or mortgage of copyholds is contemplated, the intending purchaser or mortgagee should not be satisfied with searching the court rolls for incumbrances; he ought to require the vendor or mortgagor to produce an abstract of his title, and the copy of his admission to the copyhold tenement (*n*).

Establishment of the exception.

Previously to the establishment of the doctrine of equitable mortgage by deposit of title deeds, it was held that the mere possession of the title deeds of an estate gave the holder no interest in the estate itself, except collaterally, as in the instance put by Lord Eldon (*o*); that is, if the owner of the lands could

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(*l*) *Burgess* v. *Moxon*, 2 Jur. N. S. 1059; and other cases cited *inf.*

(*m*) *Exp. Warner*, 19 Ves. 202; *Lewis* v. *John*, 9 Sim. 366; *Winter* v. *Lord Anson*, 3 Russ. 488, 493; *Whitbread* v. *Jordan*, 1 Y. & C. Ex. 303.

(*n*) *Whitbread* v. *Jordan*, *supra*.

(*o*) *Exp. Whitbread*, 19 Ves. 211.

not part with the estate without the deeds, he should not have them without paying the debt due from him to the holder, so that the possession of the deeds gave no direct interest in the estate, but gave to the creditor an interest arising out of the power of embarrassing the property in the sale (*p*). And it was considered that to give the creditor a charge on the land without an agreement in writing would be in direct contravention to the Statute of Frauds.

But even at the present day the owner of land may deal with the title deeds as mere personal chattels divorced from the land, and may include them in a bill of sale without any intention of creating a charge on the land (*q*).

The first decision in favour of the doctrine of equitable mortgage by deposit of title deeds was made by Lord Thurlow, C., in *Russell* v. *Russell* (*r*), and was followed by him in other cases (*s*). These decisions are the foundation of the doctrine, which, however much it has excited the disapprobation of succeeding judges (*t*), has now become firmly established.

Verbal agreement without deposit.

A verbal agreement for a deposit, not accompanied by an actual deposit, is void under the Statute of Frauds (*u*). But the deposit will create an equitable mortgage for the debt then due, although there be not one word spoken at the time (*x*).

If there is a parol agreement to give security for a debt, and title deeds are subsequently delivered to the creditor, this will be a sufficient part performance of the agreement to take the

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And see *Exp. Kensington*, 2 V. & B. 83.

(*p*) See *Head* v. *Egerton*, 3 P. Wms. 279. As a general rule the title deeds follow the legal estate (see *Smith* v. *Chichester*, 2 Dr. & War. 393); and the owner of such estate may maintain trover for them as against a depositee (*Harrington* v. *Price*, 3 B. & Ad. 170; *Hooper* v. *Ramsbottom*, 6 Taunt. 12. See *Goode* v. *Burton*, 1 Exch. 189); but a tenant in fee simple may give or grant away the deeds of his land, and the heir would have no remedy: Shep. Touchst. by Preston, 241. Similarly, an obligation or policy of insurance may be given away without an assignment, and trover would not lie for the document by the owner of the money secured. See *Barton* v. *Gainer*, 3 H. & N. 387; *Rummens* v. *Hare*, 1 Ex. D. 169; *Trimmer* v. *Danby*, 25 L. J. Ch. 424. If, after such a gift, a legal mortgage or assignment were made of the land or debt, the mortgagee or assignee would have a difficulty in recovering the documents of title.

(*q*) *Swanley Coal Co.* v. *Denton*, (1906) 2 K. B. 873, C. A.

(*r*) 1 Bro. C. C. 269.

(*s*) *Featherstone* v. *Fenwick*; *Hurford* v. *Carpenter*, 1 Bro. C. C. 270, note.

(*t*) *Exp. Haigh*, 11 Ves. 403; *Norris* v. *Wilkinson*, 12 Ves. 192; *Exp. Whitbread*, 19 Ves. 211; *Exp. Hooper*, 1 Mer. 7.

(*u*) *Exp. Hooper*, *sup.*; *Exp. Coombe*, 4 Madd. 249. See *Meux* v. *Smith*, 11 Sim. 410; *Tebb* v. *Hodge*, L. R. 5 C. P. 73; *Exp. Perry*, 3 M. D. & De G. 252; *Exp. Hallifax*, 2 M. D. & De G. 544. A party intending to rely on the Statute of Frauds must plead the same. See Ord. XIX. r. 15.

(*x*) *Exp. Mountfort*, 14 Ves. 606; *Exp. Langston*, 17 Ves. 230; *Exp. Kensington*, 2 V. & B. 79, 83; *Bozon* v. *Williams*, 3 Y. & J. 152.

case out of the Statute of Frauds, and the security will relate back to the time of the agreement (*y*).

Where a deposit had been made to secure an usurious loan before 17 & 18 Vict. c. 90, a verbal agreement, subsequent to the statute, for a legal mortgage for the same loan, was held valid without a return and fresh deposit (*z*).

Written agreement without deposit.

Where there is a memorandum of agreement for a security by deposit of deeds, the security will be upheld so as to charge the property, though no deeds have actually been deposited (*a*), or even though some of them may not have been executed (*b*).

Deposit entitles lender to legal mortgage,

Where a deposit of deeds by way of security is accompanied by an agreement in writing to execute a legal mortgage, it is clear that such agreement will be specifically enforced (*c*). But where there is no such agreement, and even where no memorandum of charge whatever accompanies the deposit, it has been held that the mere deposit entitled the holder to have a legal mortgage, such being presumed to have been the intention of the parties (*d*).

A deposit of deeds has always been considered as an imperfect mortgage which the mortgagee is entitled to have perfected or rather as a contract which would give him all such rights as he would be entitled to if the contract were completed (*e*).

except in case of surety.

But where a deposit is made as an indemnity to a surety, he is not entitled to a legal mortgage, only to a memorandum stating the purpose of the deposit (*f*).

Vesting declaration.

A mortgagor by deposit of deeds may declare himself trustee of the legal estate for the mortgagee, and the mortgagee may in such case appoint new trustees in the place of the mortgagor, and vest the legal estate in them by a declaration under sect. 12 of the Trustee Act, 1893 (*g*).

(*y*) *Edge* v. *Worthington*, 1 Cox, 211.

(*z*) *James* v. *Rice*, 5 De G. M. & G. 461.

(*a*) *Exp. Sheffield Union Bk. Co., Re Carter*, 13 L. T. 477; *Exp. Leathes*, 3 D. & C. 112; *Exp. Heathcoate*, 2 M. D. & De G. 711.

(*b*) *Exp. Orrett*, 3 M. & A. 153; *Exp. Smith*, 2 M. D. & De G. 587.

(*c*) See *ante*, p. 60.

(*d*) *Birch* v. *Ellames*, 2 Anst. 428; *Featherstone* v. *Fenwick*, 1 Bro. C. C. 270, n.; *Hankey* v. *Vernon*, 2 Cox, 10; *Exp. Coming*, 9 Ves 115; *Monkhouse* v. *Corporation of Bedford*, 17 Ves. 380; *Exp. Wright*, 19 Ves. 255; *Pryce* v. *Bury*, 2 Drew. 41.

(*e*) *Parker* v. *Housefield*, 2 M. & K. 420; *Simmons* v. *Montague*, (1909) 1 Ir. R. at p. 94.

(*f*) *Sporle* v. *Whayman*, 20 Beav. 607.

(*g*) *London and County Banking Co.* v. *Goddard*, (1897) 1 Ch. 642.

Irish Land Acts.

The restrictions on mortgaging imposed by the Irish Land Act, 1903, s. 54 (3), are confined to *instruments* of mortgage or charge and do not apply to an equitable deposit of deeds unaccompanied by any writing (*h*). Nor do they apply to a judgment mortgage (*i*).

Parol evidence not admissible to control terms of memorandum of deposit.

ii.—Memorandum accompanying Deposit of Deeds.—Where a deposit of title deeds is accompanied by a memorandum in writing, the nature and amount of charge, and the conditions of the contract intended to be created by the deposit, must be ascertained solely by reference to the written document (*k*). But the memorandum need not necessarily contain a description of the property charged (*l*). Extrinsic evidence is not admissible to raise an inference contrary to the express language of the document stating the terms on which the deposit was made (*m*).

But parol evidence may be admitted to explain ambiguities in a memorandum of deposit (*n*). Where there was an unstamped agreement between the parties, which was inadmissible as evidence, Lord Eldon allowed other parol evidence to be adduced to establish the equitable mortgage (*o*).

Deposit for special purpose.

The charge is restricted to the special purpose in the memorandum accompanying the deposit, and the conditions therein must be complied with (*p*).

Where a partner in a firm deposited with a bank certain share-certificates to secure a private debt, and the shares became the property of the firm, it was held that the bank was not entitled to retain the certificates as security for a debt due from the firm (*q*).

Enlargement of purpose.

When the deposit is made for a particular purpose, that purpose may be enlarged by a subsequent agreement, either in writing, or proved by parol evidence, without an actual re-delivery; as when deeds are deposited to secure advances by a banking firm, the deposit may be extended by agreement to

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(*h*) *National Bank* v. *Diffely*, (1910) 1 Ir. R. 271.

(*i*) *Re Roulston*, (1909) 1 Ir. R. 306.

(*k*) *Shaw* v. *Foster*, L. R. 5 H. L. 321, 341. See *Sporle* v. *Whayman*, 20 Beav. 607; *Burton* v. *Gray*, L. R. 8 Ch. 932.

(*l*) *Jared* v. *Clements*, (1902) 2 Ch. 399.

(*m*) *Exp. Coombe*, 17 Ves. 369. See *Exp. Kensington*, 2 V. & B. 79; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172; *Exp. Borrodaile*, 2 M. & A. 398.

(*n*) *Ede* v. *Knowles*, 2 Y. & C. C. C. 172; *Re Boulter, Exp. National Provincial Bank of England*, 4 Ch. D. 241.

(*o*) *Hiern* v. *Mill*, 13 Ves. 114.

(*p*) *Wylde* v. *Radford*, 9 Jur. N. S. 1169; *Exp. Robinson*, 1 D. & C. 119; *Burton* v. *Gray*, L. R. 8 Ch. 932.

(*q*) *City Bank Case*, 3 De G. F. & J. 629.

secure advances made by the bank after a change of partners (*r*). There is a constructive re-deposit with each successive firm (*s*). But there is no presumption of such agreement (*r*).

Intent to give security essential to charge by deposit.

iii.—Deposit must be by way of Security.—The deposit must be made with the view and intent of an immediate security and not *diverso intuitu*. So where a debtor, whose deeds relating to certain freehold property were in the possession of his bankers as security for a debt due to them, gave to them an unsigned order to deliver over the deeds, so soon as their lien should have been satisfied, to another creditor, and at the same time handed to the creditor two leases of other property, it was held that there was one entire agreement for a deposit of all the deeds (subject, as to those relating to the freehold, to the bankers' lien) by way of security for the debt due to the other creditor, and that there had been such part performance of that agreement as to take the case out of the Statute of Frauds and create a valid equitable mortgage on the freeholds (*t*). But where a debtor gave a verbal promise to a bank that he would, when required, give security for a debt, and the title deeds of certain property in which he was beneficially interested subsequently came into the possession of the manager of the bank, who was also beneficially interested in the property, for purposes relating to payment of succession duty, and the debtor verbally assented to the retention of the deeds by the bank as security for their claim; it was held that, the deeds having come into the possession of the bank for another purpose, there had been no such part performance of the promise to give security as to exclude the operation of the statute, and to create an equitable charge in favour of the bank (*u*).

So, where a person applied to his bankers for a loan on the security of the deposit of a lease, which they declined, but he left it with them without stating for what purpose the lease was so left, it was held that this gave the bankers no lien in respect of an outstanding debt due by the owner of the lease to the bankers (*x*).

(*r*) *Exp. Kensington*, 2 Ves. & B. 79; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172.

(*s*) *Exp. Oakes*, 2 M. D. & De G. 234; *Smith* v. *Gye*, 2 M. D. & De G. 314.

(*t*) *Daw* v. *Terrall*, 33 Beav. 218. See *Re McMahon*, 55 L. T. 763.

(*u*) *Exp. Broderick*, *Re Beetham*, 18 Q. B. D. 766, C. A.

(*x*) *Lucas* v. *Dorrien*, 7 Taunt. 278.

Presumption that deeds in the hands of a creditor are held as security.

As between a debtor and his creditor, however, the mere fact of possession of deeds by the latter generally raises a presumption that they were deposited with him as security for the debt; and the burden of proof lies upon the debtor to rebut the presumption (*y*). This presumption, however, will not apply to a case where a legal mortgagee is found to be in possession of title deeds relating to property of the debtor other than that expressly comprised in the mortgage deed (*z*).

But as against third persons, a mere deposit of deeds without a memorandum in writing will create an equitable mortgage only where the possession of the title deeds can be accounted for in no other manner; as where the holder of the deeds was a stranger to the title and the lands (*a*). Where the origin of the possession of title deeds by a bond creditor was not explained, it was held that there was no such deposit as to create an equitable charge on the lands as against persons interested therein under the will of the testator (*b*). Where the deposit is made for securing a sum to the trustees of a voluntary settlement, the intention must be clearly shown (*c*).

Evidence.

The proof of the relation of the debt to the deposit must be supported by proper evidence at the hearing (*d*); for if the evidence is not sufficient, there will be no inquiry (*e*). In case of loss of the deeds verbal evidence is sufficient (*f*).

Deposit with creditor's solicitor.

Where there is an agreement to give a mortgage, accompanied by the delivery of the deeds to the creditor's solicitor for the purpose of preparing a legal mortgage, the intent to create an immediate security will be presumed, and the delivery will constitute a present equitable mortgage by deposit of deeds though the agreement is not in writing (*g*). It has been held that such a delivery must be clearly shown to be made with the intention of immediately securing an existing debt or a present advance, and not merely for the purpose of having a legal mortgage prepared to secure such debt or advance; but the decisions

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(*y*) *Russell* v. *Russell*, 1 Bro. C. C. 269; *Burgess* v. *Moxon*, 2 Jur. N. S. 1059. See *Exp. Wright*, 19 Ves. 258.

(*z*) *Wardle* v. *Oakley*, 36 Beav. 27.

(*a*) *Bozon* v. *Williams*, 3 Y. & J. 152.

(*b*) *Chapman* v. *Chapman*, 13 Beav. 308. See *Dixon* v. *Muckleston*, L. R. 8 Ch. 155, 162.

(*c*) *James* v. *Bydder*, 4 Beav. 600.

(*d*) *Chapman* v. *Chapman*, *sup.*; *Kebell* v. *Philpot*, 7 L. J. N. S. Ch. 237.

(*e*) *Kebell* v. *Philpot*, 7 L. J. N. S. Ch. 237. See *Holden* v. *Hearn*, 1 Beav. 456.

(*f*) *Baskett* v. *Skeel*, 11 W. R. 1019.

(*g*) *Exp. Bruce*, 1 Rose, 374; *Exp. Wright*, 19 Ves. 258; *Keys* v. *Williams*, 3 Y. & C. Ex. 55. See *Hockley* v. *Bantock*, 1 Russ. 141.

referred to (*h*) are contrary to the current of authority, and may apparently be regarded as obsolete.

Deposit with debtor's solicitor.

A deposit of deeds with the debtor's own solicitor, to be held by him until a mortgage is executed, and then to be handed over to the creditor, creates an equitable charge, and constitutes the solicitor a trustee for the creditor (*i*).

Whether deposit covers further advances.

iv.—Whether a Deposit covers further Advances.—If it appears that a deposit of deeds is made for the purpose of gaining credit, it will not cover moneys previously advanced and then due (*k*), unless an intention to cover them appears from the circumstances (*l*).

But the deposit may be a security as well for debts actually due as also for future advances, if such intention is made out by oath uncontradicted, or other sufficient evidence (*m*); and generally, a verbal agreement for a subsequent advance on a deposit of deeds already made for the purpose of securing an existing debt, is sufficient to constitute an equitable mortgage as to the subsequent advance (*n*).

Where a mortgage by deposit was made to secure the debtor's account until such account should not exceed 100*l*., and the debtor died indebted to the mortgagee beyond that sum, it was held that the deposit was a security for the whole sum, and not merely for the excess above the 100*l*. (*o*).

The deposit of deeds with the creditor's solicitor for the purpose of preparing a legal mortgage to secure an antecedent debt and future advances, though unaccompanied by any written agreement, will cover future advances (*p*).

Deposit may be of part of deeds.

v.—What Deeds, &c. must be deposited.—In order to constitute the equitable mortgage by deposit, there need not be a

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(*h*) *Norris* v. *Wilkinson*, 12 Ves. 192; *Exp. Bulteel*, 2 Cox, 243.

(*i*) *Lloyd* v. *Attwood*, 3 De G. & J. 614.

(*k*) *Mountford* v. *Scott*, T. & R. 274.

(*l*) *Exp. Farley*, 1 M. D. & De G. 683; *Exp. Smith*, 2 M. D. & De G. 314.

(*m*) *Exp. Mountfort*, 14 Ves. 606; *Exp. Langston*, 17 Ves. 230. And see *Exp. Hooper*, 19 Ves. 477; *Shepherd* v. *Titley*, 2 Atk. 348.

(*n*) *Exp. Kensington*, 2 V. & B. 97; *Exp. Whitbread*, 19 Ves. 209; *Exp. Lloyd*, 1 Gl. & J. 389; *Exp. Nettleship*, 2 M. D. & De G. 124; *Ede* v. *Knowles*, 2 Y. & C. C. C. 178; *Exp. Sanders*, 3 L. J. N. S. Bky. 92; *Exp. Marsh*, 2 Rose, 289; *Exp. Smith*, 2 M. D. & De G. 314, 318.

(*o*) *Ashton* v. *Dalton*, 2 Coll. 565.

(*p*) *Bulfin* v. *Dunne*, 11 Ir. Ch. R. 198.

delivery of all the title deeds (*q*). In *Exp. Wetherell* (*r*), the question was, what was the effect of the delivery of the title deeds to one moiety only of the estate, the title deeds of the other moiety being retained by the debtor and passing into the possession of his assignees, the mortgagees having understood that the deeds delivered to them related to the entirety. Lord Eldon, C., thought that, under the circumstances of that case, there was sufficient evidence in writing (and on this he grounded his decision) that there should be a mortgage of the entirety, and, consequently, he did not determine, to use his own words, "whether that would not be taken to be a sufficient deposit, which could be taken, upon looking at the instruments, to amount to evidence that the estate was meant to be a security."

The equitable mortgagee by deposit of part of the deeds was held entitled to a charge on the property where the rest of the deeds remained in the possession of depositor's solicitors (*s*); and the deposit was supported, though the absent deed was the conveyance (*t*), and where evidence in writing existed that the security was intended upon the whole (*u*). The deposit by a landlord of a lease to a creditor as a security, was held equivalent to an equitable mortgage of the fee (*x*); and if part of the title deeds be deposited with one creditor and part with another, each depositee may have a good security (*y*), unless there be evidence of a contrary intention (*z*).

Deposit of receipt for purchase-money.

An equitable mortgage may be created by the deposit of a receipt for purchase-money, containing the terms of the agreement for sale, if there be no title deeds or conveyance in the depositor's possession (*a*).

Deposit of copies.

But a deposit of an attested copy of a deed is not sufficient to create a valid equitable charge (*b*).

Removal of deposited deeds.

Where a debtor deposited title deeds as security, but afterwards fraudulently removed some of them, and the deeds

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(*q*) *Exp. Pearse*, 1 Buck. 525; *Exp. Arkwright*, 3 M. D. & De G. 129. See *Lacon* v. *Allen*, 3 Drew. 579; *Jones* v. *Williams*, 24 Beav. 47.

(*r*) 11 Ves. 398.

(*s*) *Exp. Chippendale*, 2 M. & A. 299. See *Ashton* v. *Dalton*, 2 Coll. 565.

(*t*) *Roberts* v. *Croft*, 2 De G. & J. 1. See *Thorp* v. *Holdsworth*, L. R. 7 Eq. 147; *Exp. Edwards*, 1 Deac. 611.

(*u*) *Exp. Pott*, 7 Jur. 159.

(*x*) *Richards* v. *Borrett*, 3 Esp. 102.

(*y*) *Roberts* v. *Croft*, 24 Beav. 223, affirmed 2 De G. & J. 1.

(*z*) *Exp. Pearse*, 1 Buck. 525.

(*a*) *Goodwin* v. *Waghorn*, 4 L. J. Ch. 172.

(*b*) *Exp. Broadbent*, 1 M. & A. 635.

removed could not be identified, it was held that the creditor had a lien on all title deeds belonging to the debtor (*c*).

Memorandum incorrectly referring to deeds.

If the memorandum accompanying a deposit of deeds refers to deeds not deposited, and other deeds are deposited, the security will attach to the deeds actually deposited (*d*). If the memorandum specifies only some of the deeds which are actually deposited, the security will attach to all the deeds deposited (*e*).

Deposit of land certificate;

An equitable mortgage of land, the title to which is registered under the Land Transfer Act, cannot be created by a deposit of title deeds; but a deposit of the land certificate has the same effect, for the purpose of creating a lien upon the estate and interest of the depositor, as a deposit of the title deeds would have had before the passing of the Act.

—under Land Transfer Act, 1897.

Under the Land Transfer Act, 1897 (*f*), the registered proprietor of any freehold or leasehold land or of a charge may, subject to any registered estates, charges, or rights, create a lien on the land or charge by deposit of the land certificate or office copy of registered lease or certificate of charge, and such lien shall, subject as aforesaid, be equivalent to a lien created by the deposit of title deeds, or of a mortgage deed of unregistered land by an owner entitled in fee simple, or for the term or interest created by the lease for his own benefit, or by a mortgagee beneficially entitled to the mortgage. The deposit can be protected by notice to the registrar, and the entry of such notice will operate as a caution (*g*). So long as such notice is on the register no new certificate will be issued without notice similar to that under a caution (*h*). Where the loan is to enable a purchase to be completed, and the certificate is not yet in existence, notice of the intended deposit may be given, and in this way a lien equivalent to that created by the deposit of a certificate may be created (*i*). A notice of intended deposit will operate as a caution (*k*). Notice of deposit or intended deposit shall not be entered while another such notice is on the register (*l*). The lien created by deposit or notice of intended

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(*c*) *Mason* v. *Morley*, 34 Beav. 475.

(*d*) *Exp. Powell*, 6 Jur. 490.

(*e*) *Ferris* v. *Mullins*, 2 Sm. & G. 378.

(*f*) 60 & 61 Vict. c. 65, s. 8 (6).

(*g*) Rule 243.

(*h*) Rule 249. The notice may be withdrawn in the prescribed manner: r. 250.

(*i*) Rules 244, 245.

(*k*) Rule 246.

(*l*) Rule 247.

deposit shall be subject to any unregistered estates, rights, or interests protected by caution or other entry on the register at the time of the creation of the lien (*m*).

Conflict of laws.

When the *lex loci rei sitæ* does not forbid, and the parties do not contract with reference to any other particular law, and the general law of the place is English, an equitable lien will be created upon land by a deposit of title deeds (*n*).

All property comprised in deeds is charged by deposit.

vi.—What Property is charged by a Deposit of Deeds.—A deposit of title deeds creates an equitable mortgage on all the property comprised in them, and all the interest of the mortgagor therein, unless the contrary intention be clearly shown (*o*).

Plan.

Where a man deposited deeds and also a plan of land not comprised in the deeds, and of which he had only a possessory title, it was held that the deposit of the plan created an equitable mortgage on the property shown on the plan (*p*).

Evidence of contrary intention.

An inference of intention may be drawn that part only of the property comprised in the deposited deeds should be subject to the security (*q*), as where the memorandum specified that part only; but other written evidence may be looked at to show the measure of the security (*r*).

Property not included in the documents deposited will not be included against strangers, merely from a false statement of the mortgagor that it was included (*s*).

Accretions.

The deposit will affect only the beneficial interest of the debtor, but will include accretions to, or substitutions for, the property affected (*t*), subject, however, to the Bills of Sale Acts.

Goodwill.

If the title deeds of a house engaged in trade are deposited to secure a debt, and the premises are sold together with the goodwill of the business, the equitable mortgagee will be entitled to the whole of the purchase-money (*u*).

Renewed lease.

A renewed lease is subject to the same equitable mortgage

(*m*) Rule 251.

(*n*) *Varden* v. *Luckpathy*, 9 Mo. I. A. 303. See *Exp. Holthausen, Re Scheibler*, L. R. 9 Ch. 722.

(*o*) *Ashton* v. *Dalton*, 2 Coll. 565; *Exp. Bisdee*, 1 M. D. & De G. 333.

(*p*) *Simmons* v. *Montague*, (1909) 1 Ir. R. 87.

(*q*) *Wylde* v. *Radford*, 9 Jur. N. S. 1169; *Exp. Robinson*, 1 D. & C. 119; *Exp. Leathes*, 3 D. & C. 112; *Exp. Heathcote*, 2 M. D. & De G. 711.

(*r*) *Exp. Glyn, Re Medley*, 1 M. D. & De G. 29; *Exp. Hunt*, 1 M. D. & De G. 139.

(*s*) *Jones* v. *Williams*, 24 Beav. 47.

(*t*) *Exp. Bisdee*, 1 M. D. & De G. 333; *Exp. Farley*, 1 M. D. & De G. 683.

(*u*) *Chissum* v. *Dewes*, 5 Russ. 29; *Pile* v. *Pile*, 3 Ch. D. 42, C. A.

that affected the former lease (x), exactly as in the case of a legal mortgage.

Lease granted pursuant to agreement.

When an agreement for a lease is deposited by way of security, and a lease is afterwards granted to the depositor upon different terms, it seems that the deposit will not be affected so far as regards the particulars to which the deposit extends (y).

Deposit by limited owner.

An owner of a limited estate has, of course, no right to charge the lands, by deposit of deeds or otherwise, beyond the extent of his estate. And accordingly, if the deeds deposited show him to be a limited owner, or if the depositee has notice of the fact *aliunde*, it is clear that the limited estate only is charged. But it seems that parol evidence of the assent of the remainderman to a deposit of deeds by a tenant for life would be admissible to charge the inheritance (z).

Tenant for life.

A legal tenant for life of freeholds is entitled to the custody of the title deeds, and the Court will not interfere as between him and the remainderman, except where there is danger to the safety of the deeds if left in the hands of the tenant for life, or where the Court requires the deeds for the purpose of carrying out trusts relating to the property (a). In consequence of this custody, the tenant for life is enabled to mortgage the land or deposit the title deeds as apparent owner of the fee, and the *bonâ fide* mortgagee has such defence as a plea of purchase for value without notice is capable of affording (b).

Husband and wife.

A deposit by husband and wife of the title deeds of the wife was held not to operate as an appointment by the wife under a settlement (c).

But where a man deposited his wife's mortgage (over which he had, *jure mariti*, a power of disposition) to secure a debt of his own, the security was upheld, as against the wife surviving, as an alienation *pro tanto* (d).

Heir or devisee.

A deposit with memorandum of charge by an heir or devisee is an alienation *pro tanto*, which will, to the extent of the moneys secured, defeat the rights of the creditors of the

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(x) And see *post*, p. 173.

(y) *Exp. Reid*, 17 L. J. Bky. 19.

(z) *Williams* v. *Medlicott*, 6 Pri. 495.

(a) *Leathes* v. *Leathes*, 5 Ch. D. 221.

(b) *Wallwyn* v. *Lee*, 9 Ves. 24. But see now *Ind, Coope, & Co.* v. *Emmerson*, 12 A. C. 300. See *post*, Chap. LVIII., Sect. II.

(c) *Lewthwaite* v. *Clarkson*, 2 Y. & C. 372.

(d) *Bates* v. *Dandy*, 2 Atk. 207.

ancestor or testator against the mortgaged property, as assets under the statute 3 & 4 Will. IV. c. 104 (*e*).

Executor.

An executor may deposit without his co-executor joining to raise money for the purpose of administration (*f*).

Person having no interest.

If a person has no interest in deeds deposited with him, he cannot, of course, confer any interest in the property comprised therein by delivering them to a third party by way of security or otherwise (*g*).

Trustee.

Where a trustee deposits the trust deeds, upon which the trust is apparent, with his bankers, the trust is prior to the lien (*h*): but the *cestuis que trust* are preferred, even if the depositee has no notice of the trust (*i*).

Fraudulent deposit of deeds.

If the deeds of one client are by the act of a solicitor deposited with another client fraudulently, the onus falls on the mortgagee to prove that the solicitor was the agent of the mortgagor (*k*); and when a solicitor permits his client to deposit deeds, he cannot set up a first mortgage of which he was assignee (*l*).

Statute of Limitations.

A son fraudulently, and without the father's knowledge, deposited in 1859 title deeds belonging to the father to secure an advance, the depositee having no notice of the fraud. In 1882 the father claimed delivery up of the deeds. The depositee refused and pleaded the Statute of Limitations; but it was held that the statute did not begin to run until the refusal (*m*).

To whom deposit may be made.

vii.—To whom the Deposit should be made.—The deposit may be made either to the creditor himself or to some third person over whom the depositor has no control (*n*).

Retainer of deeds by debtor.

But it will not be effectual if made to the wife of the depositor, nor, *à fortiori*, if permitted to be retained by the debtor (*o*), unless he gives a memorandum in writing to the creditor that he holds the deeds for the creditor as security for the debt (*p*).

(*e*) *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567. See *Re Atkinson*, (1908) 2 Ch. 307.

(*f*) *Exp. Sheffield Union Banking Co.*, *Re Carter*, 13 L. T. 477.

(*g*) *Jackson* v. *Butler*, 2 Atk. 306. See *Bell* v. *Taylor*, 8 Sim. 216.

(*h*) *Welchman* v. *Coventry Union Bk.*, 8 W. R. 729.

(*i*) *Stackhouse* v. *Countess of Jersey*, 1 J. & H. 721. See (1893) 2 Ch. 555; *Bourke* v. *Lee*, (1904) 1 Ir. R. 280.

(*k*) *Wall* v. *Cockerell*, 10 H. L. C. 229. See *Exp. Hine*, 3 De G. & J. 464; *Ogilvie* v. *Jeaffreson*, 2 Giff. 353.

(*l*) *Dowle* v. *Saunders*, 2 H. & M. 242.

(*m*) *Spackman* v. *Foster*, 31 W. R. 548. See *Miller* v. *Dell*, (1891) 1 Q. B. 468.

(*n*) *Lloyd* v. *Attwood*, 3 De G. & J. 614.

(*o*) *Exp. Coming*, 9 Ves. 115.

(*p*) *Baynard* v. *Woolley*, 20 Beav. 583.

And a written memorandum enclosing the deeds kept by the debtor, and not communicated to the creditor, is not sufficient, at all events against the trustee in bankruptcy (*q*), although it may amount to a declaration of trust (*r*).

But where the memorandum and documents were in the possession of the debtor, a secretary to a company being the creditor, the deposit was established (*s*).

Advance by third person.

The equitable deposit in the hands of one person will not be extended to an advance made by another person, unless the person holding the deeds is a mere trustee and has made no advance (*t*).

Registration.

viii.—General Remarks.—The question as to the necessity of registering a memorandum of charge accompanying a deposit of title deeds relating to land will be considered later (*u*).

Priority.

The question of the possession of deeds as affecting the priorities *inter se* of incumbrancers will also be more fully considered in a subsequent chapter (*x*).

On a review of the decided cases establishing this mode of mortgage security, it is perhaps to be regretted that the old law was not adhered to, and the principle on which the Statute of Frauds was founded more respected. For although equity, by declaring the deposit itself to be evidence of an agreement executed, has contrived to evade the strict and literal wording of the statute, yet it is manifest that the door has been in some degree opened to fraud and perjury; nor does a creditor seem to deserve much favour who will not be at the trouble of a few lines in writing (*y*) if he is desirous to have a charge on his debtor's estate. If the debtor denies that the deposit was intended to cover future advances, as in *Exp. Mountfort* (*z*), or if he insist that the deeds were not delivered by way of deposit, but with a different intent, resort must, in many cases, be had to parol evidence; and, as remarked by Lord Eldon (*z*), "the mischief of all these cases is, that the Court is deciding

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(*q*) *Wilson* v. *Balfour*, 2 Camp. 579. And see *Exp. Combe*, 9 Ves. 117; *Adams* v. *Claxton*, 6 Ves. 226; *New Prance, &c.* v. *Hunting*, (1897) 2 Q. B. 19.

(*r*) *Re Bankhead's Trusts*, 2 K. & J. 560.

(*s*) *Ferris* v. *Mullins*, 2 Sm. & G. 278.

(*t*) *Exp. Whitbread*, 19 Ves. 212; 1 Rose, 299; *Re Henry, Exp. Crossfield*, 3 Ir. Eq. R. 67.

(*u*) See *post*, Chap. LV., Sect. IV.

(*x*) See Chap. LVIII., Sect. III.

(*y*) *Exp. Whitbread*, 19 Ves. 209.

(*z*) *Exp. Mountfort*, 14 Ves. 606.

upon parol evidence with regard to an interest in land within the Statute of Frauds." Chap. VII. § 4 (viii.)

The preceding remarks strongly demonstrate the inexpediency of taking a security by deposit, unless accompanied by a memorandum stating the nature and terms of the mortgage contract, as likely to lead to dispute and litigation. This species of security ought never to be accepted, except, perhaps, in the case of small temporary loans. One advantage attending the taking of a memorandum in writing is that in case the mortgagor becomes bankrupt, and the depositee applies to the Court for an order for sale, he is allowed his costs out of the estate, but not if he has a deposit of deeds without any writing signed by the mortgagor (*a*).

(*a*) *Exp. Moss*, 3 De G. & S. 599; *post*, Chap. LI. (iv.).

CHAPTER VIII.

INSTRUMENTS COLLATERAL TO MORTGAGES.

Bonds collateral to mortgages now unusual.

i.—Of Bonds collateral to Mortgages.—It was formerly a usual practice to require borrowers to give bonds as collateral securities for the payment of the principal and interest contemporaneously secured by mortgage. But since the passing of the statute 1 Will. IV. c. 47, whereby actions on covenants may be maintained against devisees of the covenantor, collateral bonds add little or nothing to the security derived from the covenants for payment usually inserted in the mortgage. For this reason such bonds have very generally fallen into disuse as merely causing unnecessary expense.

Inasmuch, however, as bonds given by way of collateral security for the payment of mortgage-moneys are still occasionally met with in practice (*a*), it may be useful to state briefly some of the points which have been decided in regard to such instruments.

Interest beyond penalty.

Although it is a general rule that a bond debt shall not carry interest beyond the penalty (*b*), yet the rule will not apply where the repayment of a principal sum, with all interest that may accrue due thereon, is secured by a mortgage and also by a bond for the same sum, as the mortgagee's right to recover all interest due is not to be prejudiced by the bond (*c*); and this principle will apply even although the mortgage is given by a surety and subsequent to the bond, unless the mortgage is made a security only for the bond debt and the interest to become due on the bond (*d*).

The rule that interest on a bond debt is not allowed beyond the penalty of the bond prevails in the administration of assets, except under special circumstances (*e*).

(*a*) See *Greenwood* v. *Francis*, *post*, p. 107.

(*b*) See *Knipe* v. *Blair*, (1900) 1 Ir. R. 372.

(*c*) *Clarke* v. *Lord Abingdon*, 17 Ves. 106.

(*d*) See *Hughes* v. *Wynne*, 1 My. & K. 20. And see *Lloyd* v. *Hatchett*, 2 Anst. 525; *Clowes* v. *Waters*, 16 Jur. 632.

(*e*) *Atkinson* v. *Atkinson*, 1 Ba. & Be. 238; *Duvall* v. *Terrey*, Show, P. C.

It is said that interest will be allowed beyond the penalty where a mortgagee has added a bond debt to his mortgage (*f*), on the principle that a mortgagor seeking the aid of equity to enforce his right of redemption must do complete equity by payment of all interest due though in excess of the penalty of the bond (*g*).

Forfeiture by non-payment of mortgage debt.

It was held in an early case, that a bond by a mortgagor for performance of the covenants and conditions in the mortgage deed would be forfeited by a breach of the proviso in the deed for the payment of the money (*h*).

Relief from forfeiture in equity.

The penalty of a bond for payment of money is generally double the amount of the principal sum to be thereby secured. If the money be not paid at the time limited in the condition, the bond becomes forfeited, or absolute at law. On the forfeiture of a bond the whole penalty was formerly recoverable at law (*i*), but the Courts of Equity interfered and would not permit a man to take more than in conscience he ought to take, namely, his principal, interest and costs (*k*). Wherever the payment of a smaller sum is secured by a larger, the Court will treat the larger sum as a penalty, and not as liquidated damages, and will relieve accordingly (*l*).

Non-payment of instalment.

Where a bond is given to secure a principal sum by instalments, and default is made in payment of any one of the instalments at the time appointed, as the condition is broken, the obligee may bring an action, and obtain judgment for the whole penalty ; though the Court would prevent his taking execution for more than is due (*m*).

Warrants of attorney formerly taken as securities collateral to mortgages.

ii.—Of Warrants of Attorney.—Warrants of attorney to confess judgment sometimes accompanied mortgages by way of collateral security, so as to enable the mortgagee to enter up judgment and issue execution. It was never the practice,

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15; *Grant* v. *Grant*, 3 Russ. 607; *Knipe* v. *Blair*, (1900) 1 Ir. R. 372. And see the same principle in *Bond* v. *Hopkins*, 1 Sch. & L. 413, 434; *Pulteney* v. *Warren*, 6 Ves. 73—79.

(*f*) *Peers* v. *Baldwin*, 2 Eq. Ca. Abr. 611. As to adding bond debts by mortgagee on taking accounts, see *post*, Chap. LIV., Sect. II.

(*g*) See *Godfrey* v. *Watson*, 3 Atk. 517 (tacking judgment). But see *contra*, Powell on Mortgages (6th ed.), 355.

(*h*) *Tooms* v. *Chandler*, 2 Lev. 116; *contra*, *Briscoe* v. *King*, Cro. Jac. 281; *nom. Bristoe* v. *Knipe*, Yelv. 206.

(*i*) But see 4 & 5 Anne, c. 16, ss. 12, 13.

(*k*) *Lord Lonsdale* v. *Church*, 2 T. R. 388; *Wilde* v. *Clarkson*, 6 T. R. 303.

(*l*) *Aylet* v. *Dodd*, 2 Atk. 239; *Davies* v. *Penton*, 6 B. & Cr. 223.

(*m*) *Darby* v. *Wilkins*, 2 Stra. 957; *Masfen* v. *Touchet*, 2 W. Bl. 706.

except in particular cases, and as a matter of special contract, to take a warrant of attorney to enter up judgment against a mortgagor.

Warrants of attorney were considered particularly appropriate in cases of annuities, as not only affording the grantee a speedy and effectual means of compelling payment by entering up and confessing judgment and taking out execution for the arrears, but also as giving to the grantor, or any person claiming under him, a right at any time to apply to the original jurisdiction of the Court to vacate the warrant of attorney or set aside the judgment, instead of having recourse to the more circuitous mode of proceeding provided by the Annuity Act (*n*).

Warrants of attorney now unusual in mortgage transactions.

The simplification of procedure in actions for debt generally has caused warrants of attorney by way of collateral security to mortgages to be rarely met with in modern practice.

For further information on this subject the reader is referred to the previous edition of this work.

(*n*) Barton, Conv. vol. vi. p. 16, n.

CHAPTER IX.

OF SURETYSHIP.

Section I.

Of the Nature of Contract of Suretyship.

As to requiring sureties to join in mortgage securities.

i.—Of Sureties in Mortgage Transactions generally.—Where property is mortgaged which is not immediately realizable by the mortgagee in case of default, or which does not of itself yield an immediate income to meet the payment of interest (as, for instance, in the cases of mortgages of policies of life assurance and of reversionary interests), third persons are frequently made parties to the mortgage deed for the purpose of guaranteeing the payment of principal and interest, or of interest alone, and the performance of covenants on the part of the mortgagor necessary for the maintenance of the security.

Proviso that surety shall be liable to mortgagee as principal.

In order to obviate the risk which the mortgagee runs in such cases of losing his remedies against the surety by reason of subsequent transactions between himself and the mortgagor, who is the principal debtor, it is the usual practice that the surety should enter, jointly and severally with the mortgagor, into all the covenants and stipulations, the performance and observance of which the surety is intended to guarantee, and that a proviso should be inserted in the mortgage deed that, although, as between the mortgagor and the surety, the latter is only a surety, yet that, as between himself and the mortgagee, he shall be deemed a principal debtor, and shall not be released by any subsequent transaction between the mortgagor and mortgagee which would otherwise have that effect (*a*). The effect of such a proviso is materially to vary, and, indeed, to a great extent, to exclude, the operation of the rules of law which, in the absence of

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(*a*) See Dav. Conv. (4th ed.), vol. ii. pt. ii. p. 603; Key & Elph. Conv. (9th ed.), vol. ii. pp. 29, 89.

express contract, regulate the relations of principal and surety, as between them and the creditor.

A proviso to the above effect is inserted in all well-drawn mortgages to which sureties are parties; but cases not unfrequently occur in practice where it appears from the terms of the instrument, or from the circumstances of the case, that one or more of the parties to a mortgage deed or equitable charge are merely sureties for the payment of the debt by the principal debtor or debtors. A full and general consideration of the law of principal and surety would be foreign to the scope of the present treatise, but it is proposed in the following pages to consider this subject so far as relates to the liabilities, rights and remedies of sureties in mortgage transactions.

Parol evidence as to suretyship.

If it appears by the instrument itself that a person is thereby jointly and severally bound with the principal debtor for payment of the debt, parol evidence is admissible to prove that he is only a surety (*b*). So, where in a suit to redeem, the mortgagors alleged that they were sureties only, the mortgagees were compelled to discover their dealings with the alleged principals (*c*).

Co-debtors may become principal and surety by subsequent arrangement.

Where two persons are originally co-debtors, they may, by subsequent arrangement between themselves, without the concurrence or consent of the creditor, make one of them primarily liable for the debt and the other a surety only; and if notice of such arrangement is given to the creditor he will be bound thereby so as to render him liable to the risk of losing his remedies against the surety by subsequent dealings with the person who has become the sole principal debtor, as by giving time to him (*d*).

ii.—Statute of Frauds.—The Statute of Frauds (*e*) enacts that:—

No action on guaranty unless in writing.

"No action shall be brought whereby to charge . . . . the defendant upon any special promise to answer for the debt,

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(*b*) *Craythorne* v. *Swinburne*, 14 Ves. 160, 170; *Clarke* v. *Henty*, 3 Y. & C. (Ex.) 187. See *Macdonald* v. *Whitfield*, 8 App. Ca. 733; Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11).

(*c*) *Bridgwater* v. *De Winton*, 33 L. J. Ch. 238.

(*d*) *Rouse* v. *Bradford Banking Co.*, (1894) 2 Ch. 32, C. A.; affirmed on other grounds, (1894) A. C. 586. See *Oakeley* v. *Pasheller*, 4 Cl. & F. 207; *Overend, Gurney & Co.* v. *Oriental Financial Corp.*, L. R. 7 H. L. at p. 360.

(*e*) 29 Car. II. c. 3, s. 4. See *Mallet* v. *Bateman*, L. R. 1 C. P. 163, Ex. Ch.

> default, or miscarriage of another person . . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Written guarantee shall not be invalid by reason that the consideration does not appear in writing or by necessary inference from a written document.

Formerly, if such an undertaking was made by writing not under seal, the consideration must have appeared on the face of the writing (*f*); but now by sect. 3 of the Mercantile Law Amendment Act, 1856 (*g*), it is enacted as follows:—

> "No special promise to be made by any person after the passing of this Act, to answer for the debt, default or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document."

Parol evidence of consideration, &c.

Although parol evidence is admissible to supply the consideration for a guaranty, it cannot be admitted to explain the promise, which must still be in writing (*h*). And if the consideration does not appear on the face of the guaranty, it must be clearly proved by parol evidence (*i*).

If the guaranty is given by a separate instrument, parol evidence is admissible to identify the security in respect of which the promise is made (*k*) or the amount of the debt intended to be guaranteed (*l*), or whether it was intended to be a continuing guaranty to cover further advances (*m*).

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SECTION II.

AVOIDANCE OF CONTRACT OF SURETYSHIP.

Contract of suretyship requires

i.—Of Suretyship Contracts void ab initio.—The contract of suretyship requires that all parties to it should mutually exer-

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(*f*) *Wain* v. *Warlters*, 5 East, 10; *Saunders* v. *Wakefield*, 4 B. & Al. 595.

(*g*) 19 & 20 Vict. c. 97.

(*h*) *Holmes* v. *Mitchell*, 7 C. B. N. S. 361.

(*i*) *Glover* v. *Halkett*, 2 H. & N. 489.

(*k*) *Shortrede* v. *Cheek*, 1 A. &. E. 57.

(*l*) *Bateman* v. *Phillips*, 15 East, 272. See *Brunton* v. *Dullens*, 1 F. & F. 450.

(*m*) *Grahame* v. *Grahame*, 19 L. R. Ir. 249.

utmost good faith between all parties.

cise the utmost good faith (*n*). The contract will be void in its inception, unless the fullest information is afforded to the surety as to all material facts affecting his obligations and liabilities, and unless the instrument strictly and literally embodies the terms on which he agreed to assume such obligations and liabilities. So, also, a contract of suretyship, though originally valid, will be avoided by any subsequent transaction between the creditor and the principal debtor which may affect the remedies or liabilities of the surety.

Contract avoided *ab initio* by misrepresentation.

Thus, the contract will be void *ab initio* if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and the debtor is misrepresented to the surety, and the misrepresentation be such that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the surety's liability might be thereby increased (*o*).

Concealment of material fact will avoid contract.

So, if a private bargain is entered into between the creditor and principal debtor which may have the effect of varying the responsibility or position of the surety, the withholding the knowledge of that bargain from the surety will vitiate the contract of suretyship (*p*).

Fact concealed must be material.

In order, however, to vitiate the contract, the concealment must be of a fact which materially varies the position of the surety from that which he might naturally expect to hold. So, where a surety guaranteed a cash account opened by the principal debtor to the amount of 750*l*., and the money was applied in discharge of a debt of that amount owing by the principal debtor to the same creditor, of the existence of which debt the surety was not informed, it was held that the creditor was under no obligation to disclose the purpose for which the money was intended to be applied, and that the concealment of the existing debt did not avoid the contract of suretyship (*q*).

Creditor, when bound to make inquiries as to fraud.

A creditor is not, as a general rule, bound to inquire into the circumstances under which a person becomes surety to him for a debt, unless the circumstances are of such a nature that they

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(*n*) *Davies* v. *London and Provincial Marine Insurance Co.*, 8 Ch. D. 469, C. A.

(*o*) See *Stone* v. *Compton*, 5 Bing. N. S. 142, 157; *Smith* v. *Bank of Scotland*, 1 Dowl. 272; *Railton* v. *Matthews*, 10 Cl. & F. 934; *Burke* v. *Rogerson*, 14 L. T. N. S. 780.

(*p*) *Pidcock* v. *Bishop*, 3 B. & Cr. 605. See *Maltby's case*, cited 1 Dowl. 294.

(*q*) *Hamilton* v. *Watson*, 12 Cl. & F. 109; *Mackreth* v. *Walmesley*, 51 L. T. 19.

ought to raise a reasonable ground of suspicion in his mind that the surety has been induced to assume his obligations by fraud on the part of the debtor; under such circumstances the creditor is bound to make inquiries (*r*).

Application of the rule to mortgages of life policies.

The rule that the fullest disclosure must be made to the surety would seem to be applicable with the utmost strictness when a third party concurs in a mortgage of a policy of life assurance for the purpose of guaranteeing the payment of the mortgage moneys, and the punctual payment of the premiums; for in such cases the creditor and the assured have full knowledge of all circumstances affecting the health of the assured, and other matters with regard to which the surety cannot readily obtain information (*s*).

Alteration of conditions of contract.

ii.—Of the Discharge of the Surety by Subsequent Transactions.—The contract of suretyship is construed in the strictest manner, so that the surety will only be bound according to the strict letter of his engagement (*t*). If it is in any way altered without his consent, unless obviously for his benefit, he is entitled to be discharged (*u*). He is discharged by an arrangement between the mortgagee and the mortgagor affecting a fund which the surety had a right to rely on (*x*). Any departure from the conditions will discharge him, even though he is not thereby prejudiced (*y*).

Absolute release of principal discharges surety.

An absolute release of the principal debtor of course discharges the surety by extinguishing the debt; and in such a case the creditor cannot reserve any rights against the surety, as the debt is gone, so that no rights of action with regard to it can remain (*z*).

But it is perfectly possible for a surety to contract with a creditor in the suretyship instrument that notwithstanding any composition, release, or arrangement the surety shall remain liable, although the principal is released (*a*).

(*r*) *Owen* v. *Homan*, 4 H. L. C. 997. See *Maitland* v. *Irving*, 15 Sim. 437.

(*s*) See *North British Insurance Co.* v. *Lloyd*, 10 Exch. 523; *Wythes* v. *Labouchere*, 3 De G. & J. 593.

(*t*) *Stamford, &c. Bkg. Co.* v. *Ball*, 4 De G. F. & J. 310; *Blest* v. *Brown*, 4 De G. F. & J. 367, 376.

(*u*) *Blest* v. *Brown*, *sup.*; *Samuel* v. *Howarth*, 3 Mer. 272; *Gardner* v. *Walsh*, 5 E. & B. 83; *Polak* v. *Everett*, 1 Q. B. D. 669; *Holme* v. *Brunskill*, 3 Q. B. D. 495; *Bolton* v. *Salmon*, (1891) 2 Ch. at p. 54.

(*x*) *Gen. Steam, &c. Co.* v. *Rolt*, 6 Jur. N. S. 801. See *Mortgage Insurance Corp.* v. *Pound*, 65 L. J. Q. B. 129.

(*y*) *Lawrence* v. *Walmesley*, 31 L. J. C. P. 143.

(*z*) *Commercial Bank of Tasmania* v. *Jones*, (1893) A. C. 313.

(*a*) *Perry* v. *National Provincial Bank*, (1910) 1 Ch. 464, C. A., *post*, p. 92.

Effect of payment of debt subsequently set aside.

Although, of course, payment off of the debt by the principal discharges the surety from all obligations in respect of it, yet a payment which is subsequently set aside for fraudulent preference is not a satisfaction of the debt so as to discharge the surety (*b*).

Effect of giving time to principal debtor.

If the creditor enters into a binding contract with the principal debtor to give him further time to pay, without the concurrence of the surety, the surety is discharged, because the creditor has put it out of his own power to enforce immediate payment, which the surety would have a right to require him to do (*c*).

Parol agreement to give time.

A parol agreement for good consideration to give time to the principal debtor, being enforceable in equity, will discharge the surety, although the principal is bound by deed (*d*).

A parol agreement to alter the contract, between the creditors and principal debtor, was no answer at law to an action on a bond against a surety, but a Court of Equity would, in such case, have interfered (*e*).

Agreement to give time must be binding.

There must, however, be a clear and binding contract with the principal debtor to give time in order to discharge the surety (*f*). An agreement without consideration is not binding, and will not discharge the surety (*g*). So, also, mere forbearance from suing the principal debtor, without a positive and binding contract to that effect between him and the creditor, will not discharge the surety (*h*).

Conditional agreement to give time.

A conditional agreement does not discharge the surety where the agreement does not become binding, from the condition not being performed (*i*).

Alteration of period of redemption of mortgage.

Where a consolidated mortgage contains a covenant by the principal debtor to pay the mortgage debt at a later date than

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(*b*) *Petty* v. *Cooke*, L. R. 6 Q. B. 790.

(*c*) *Bank of Ireland* v. *Beresford*, 6 Dow, 238; *Oakeley* v. *Pasheller*, 4 Cl. & F. 207. See *Rees* v. *Berrington*, 2 Ves. jun. 540; *Strong* v. *Foster*, 17 C. B. 219; *Oriental Financial Corp.* v. *Overend, Gurney & Co.*, L. R. 7 Ch. 142; *Bolton* v. *Buckenham*, (1891) 1 Q. B. 278, C. A.

(*d*) *Blake* v. *White*, 1 Y. & C. Ex. 420; *Nisbet* v. *Smith*, 2 Bro. C. C. 579.

(*e*) See *Davey* v. *Prendergrass*, 5 B. & Ald. 187, and cases in note to *Heath* v. *Key*, 1 Y. & J. 434.

(*f*) *Heath* v. *Key*, *supra*; *Clarke* v. *Birley*, 41 Ch. D. 422.

(*g*) *Blake* v. *White*, 1 Y. & C. Ex. 420; *Clarke* v. *Wilson*, 3 M. & W. 208; *Lyon* v. *Holt*, 5 M. & W. 250; *Tucker* v. *Laing*, 2 K. & J. 749.

(*h*) *Samuel* v. *Howarth*, 3 Mer. 278; *Wright* v. *Simpson*, 6 Ves. 734; *Bell* v. *Banks*, 3 Man. & Gr. 258; *Bonser* v. *Cox*, 13 L. J. Ch. 261; *Heath* v. *Key*, 1 Y. & J. 434; *Hollier* v. *Eyre*, 9 Cl. & F. 57.

(*i*) *Price* v. *Edmonds*, 10 B. & C. 578.

that fixed by the deed to which the surety was a party, this necessarily suspends the remedy against the principal debtor, and consequently amounts to a giving of time which will discharge the surety (*k*).

Additional security for debt.

The giving of additional security by the principal debtor to the creditor is not necessarily of itself a giving of time to the principal (*l*). But the taking in lieu of an equitable mortgage by deposit of a legal mortgage for a larger amount, with a covenant for payment of the principal at a later date, was held to amount to a giving of time to the principal debtor so as to discharge a surety who had guaranteed the repayment of the original loan (*m*).

Release of principal from liability under covenant.

Where a surety guaranteed the payment of premiums of a mortgaged policy, the release by the mortgagee of the mortgagor from personal liability under his covenants to pay the premiums was held to discharge the surety (*n*).

Exception to rule where remedies of surety are not affected.

The surety will not be discharged by a contract with a stranger to give time to the principal debtor, nor by the taking a further security from the principal, provided the creditor's remedy under the existing security be not thereby suspended (*o*).

Mere forbearance is not giving time. Therefore if a further security is given by the debtor to induce the creditor to forbear, the surety will not be discharged unless the creditor binds himself to forbear (*p*).

The rule as to the effect of giving time has been held to be inapplicable to cases where the agreement between the principal debtor and the creditor does not in substance, though it may in appearance, amount to giving time (*q*).

Exception where rights against surety are reserved.

On giving time to the principal debtors, or other indulgence not amounting to an absolute release or obliteration of the debt, the creditor may reserve all his rights against the surety (*r*);

(*k*) *Bolton* v. *Buckenham*, (1891) 1 Q. B. 278, C. A.; *Bolton* v. *Salmon*, (1891) 2 Ch. 48.

(*l*) *Overend, Gurney & Co.* v. *Oriental Financial Corp.*, L. R. 7 H. L. 348.

(*m*) *Munster and Leinster Bank* v. *France*, 24 L. R. Ir. 82, C. A.

(*n*) *Lowes* v. *Maughan and Fearon*, 1 C. & E. 340.

(*o*) *Fraser* v. *Jordan*, 8 E. & B. 312. See *Croydon Commercial Gas Co.* v. *Dickinson*, 2 C. P. D. 46. So also the acceptance of a new bill as a collateral security does not discharge the drawer: *Pring* v. *Clarkson*, 1 B. & C. 14; *Bedford* v. *Deakin*, 2 B. & Ald. 210.

(*p*) *Twopenny* v. *Young*, 3 B. & C. 208; *Bell* v. *Banks*, 3 Man. & Gr. 258.

(*q*) *Hulme* v. *Coles*, 2 Sim. 12; *Price* v. *Edmonds*, 10 B. & Cr. 578. And see *Prendergast* v. *Devey*, 6 Madd. 124.

(*r*) *Owen* v. *Homan*, 4 H. L. C. 997, 1037; *Webb* v. *Hewitt*, 3 K. & J. 438; *ante*, p. 90.

and the latter is not discharged (*s*), "and the question whether or not the surety is informed of the arrangement is wholly immaterial" (*t*).

Effect of release of principal where remedies against surety are reserved.

So, though a simple release of the principal debtor discharges the surety, because otherwise the surety could sue the principal debtor notwithstanding the release, and so render it futile, yet, where the bargain is that the creditor is to retain his remedy against the surety, there is no fraud on the principal debtor, and the Court will give effect to the intention of the parties by construing the release as a covenant not to sue the debtor (*u*).

Where the deed containing the reservation of rights against the surety amounts not to an absolute release, but only to a covenant not to sue the principal, the surety is not discharged, for the surety may still pay the creditor and sue the principal (*x*).

So where a surety agreed to remain liable notwithstanding any agreement between the debtor and the creditor, and the creditor accepted debentures in discharge of the debt, it was held that the surety remained liable for the balance of the debt not covered by the debentures (*y*).

Release of one co-surety discharges all.

So, also, if the creditor releases or discharges one surety, the others will be discharged (*z*), unless the release can be construed as merely a covenant not to sue, and rights against the other sureties are reserved (*a*).

Satisfaction of debt.

Where an agreement is a satisfaction of the debt, although not a release at law, a reservation of the right against the surety will be bad as inconsistent with the agreement (*b*).

Loss of security.

If by the neglect of the mortgagee the benefit of all or some of the securities is lost, the surety is *pro tanto* discharged (*c*).

Assignment of judgment by debtor as

If a debtor assigns a debt, due to himself under a judgment, to his creditor, by way of collateral security, and such debt

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(*s*) *Boultbee* v. *Stubbs*, 18 Ves. 20.

(*t*) *Webb* v. *Hewitt*, 3 K. & J. 442.

(*u*) *Re Natal Investment Co.*, L. R. 6 Ch. 43, at p. 47.

(*x*) *Green* v. *Wynn*, L. R. 4 Ch. 204; *Thompson* v. *Lack*, 3 C. B. 540; *Bateson* v. *Gosling*, L. R. 7 C. P. 9; *Price* v. *Barker*, 4 E. & B. 760; *North* v. *Wakefield*, 13 Q. B. 536; *Keyes* v. *Elkin*, 5 B. & S. 240, 253.

(*y*) *Perry* v. *National Provincial Bank*, (1910) 1 Ch. 464, C. A.

(*z*) *Cheetham* v. *Ward*, 1 B. & P. 633; *Nicholson* v. *Revill*, 4 A. & E. 675; *Exp. Jacobs*, *Re Jacobs*, L. R. 10 Ch. 211; *Re E. W. A.*, (1901) 2 K. B. 642.

(*a*) *Price* v. *Barker*, 4 E. & B. 777; *Bailey* v. *Edwards*, 4 B. & S. 761. See *Exp. Good*, *Re Armitage*, L. R. 5 Ch. 46, C. A.; *Mercantile Bank of Sydney* v. *Taylor*, (1893) A. C. 317.

(*b*) *Webb* v. *Hewitt*, 3 K. & J. 438; *Kearsley* v. *Cole*, 16 M. & W. 128. See *Muir* v. *Crawford*, L. R. 2 H. L. Sc. 456.

(*c*) *Capel* v. *Butler*, 2 S. & St. 457; *Strange* v. *Fooks*, 4 Giff. 408; *Wulff* v. *Jay*, L. R. 7 Q. B. 756.

afterwards becomes irrecoverable, it seems that the loss will not fall upon the creditor merely because he gave time to the debtor under the judgment (*d*); though if he takes out execution, and so assumes, as it were, the control of the judgment, and then is guilty of neglect in levying, he becomes answerable for the loss (*e*).

collateral security.

Discharge of surety by other acts or omissions of creditor.

The surety may be discharged by the creditor's wasteful application of the principal's estate (*f*); or by omission to register a bill of sale (*g*); or an assignment of a ship (*h*); or by neglecting to insure according to contract (*i*); or by neglecting to realize a collateral security (*k*); or by not presenting a bill of exchange for payment at maturity (*l*); or by not giving notice of a mortgage of the debtor's life interest to the trustees of the settlement (*m*); or by the creditor taking a surrender from his debtor of a lease for the performance of the covenants in which the surety had given security (*n*); or by a release of the mortgage to the mortgagor's trustees in bankruptcy in consideration of a conveyance of the equity of redemption, instead of proving in the bankruptcy (*o*).

A mortgagee must not by his own act, or by consenting to acts of the mortgagor, render unavailable any part of the security to the benefit of which a surety is entitled.

Security cannot be applied for another debt.

So, a mortgagee cannot apply the security in satisfaction of any other debt than that for which the surety is liable; as where a landlord, holding a mortgage of the furniture of his tenant for a debt for which the surety was liable, distrained on the furniture for rent (*p*).

In such a case the surety will be discharged *pro tanto* (*p*).

Sale of stock by mortgagor with consent of mortgagee in course of business.

But the sale of part of the security in a due course of management does not release the surety. Thus where the mortgagor, with the consent of the mortgagee, sold certain live stock included in the security, it was held that the liability of sureties

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(*d*) *Williams* v. *Price*, 1 S. & St. 587.

(*e*) *Williams* v. *Price*, *sup.*; *Mayhew* v. *Crockett*, 2 Sw. 191.

(*f*) *Mutual Loan Fund Assoc.* v. *Sudlow*, 5 C. B. N. S. 449.

(*g*) *Wulff* v. *Jay*, L. R. 7 Q. B. 756.

(*h*) *Capel* v. *Butler*, 2 S. & St. 457. See *Straton* v. *Rastall*, 2 T. R. 366.

(*i*) *Watts* v. *Shuttleworth*, 7 H. & N. 353.

(*k*) *Mutual Loan Fund Assoc.* v. *Sudlow*, *sup.*

(*l*) *Latham* v. *Chartered Bank of India*, L. R. 17 Eq. 205.

(*m*) *Strange* v. *Fooks*, 4 Giff. 408.

(*n*) *Lord Harberton* v. *Bennett*, Beat. 386. And see *Ewin* v. *Lancaster*, 6 B. & S. 571.

(*o*) *Pledge* v. *Buss*, John. 663.

(*p*) *Pearl* v. *Deacon*, 1 De G. & J. 461.

was not affected thereby, as it must have been within the contemplation of all parties that the mortgagor, while in possession, should have power to deal with the live stock in the usual conduct of the farm business (*q*).

Acquiescence of creditor in wrongful acts.

Mere passive acquiescence by the creditor in acts of the principal debtor which are contrary to the strict conditions of the security, or otherwise improper, is not sufficient of itself to discharge the surety (*r*).

Release of a co-surety.

If one of several co-sureties or joint debtors be absolutely released, all the others are discharged (*s*), and parol evidence is not admissible of an alleged agreement to reserve the right against the rest (*t*).

If the creditor releases one co-surety, such release not amounting to an extinguishment of the debt, he may still claim a proportion of the debt against the other (*u*). If, however, the sureties are several, not joint, a release of one surety is only a discharge of the co-surety where the right of contribution has been taken away or injuriously affected (*x*).

Extent of discharge of surety by giving time, &c.

Where a person joined in the grant of an annuity as a surety for the payment of the same quarterly, it was held that the giving time to the principal grantor discharged the surety from liability in respect not only of future payments, but also of past arrears of the annuity (*y*).

The giving time to the principal debtor will not only discharge the surety from all personal liability, but will also release any property which the surety has included in his contract as security for the debt (*z*).

(*q*) *Taylor* v. *Bank of New South Wales*, 11 App. Ca. 596, P. C.

(*r*) *Mayor, &c. of Durham* v. *Fowler*, 22 Q. B. D. 394; *Mayor, &c. of Kingston-upon-Hull* v. *Harding*, (1892) 2 Q. B. 494, C. A.

(*s*) Y. B. 21 Edw. IV. 81, B. pl. 33; *Nicholson* v. *Revill*, 4 A. & E. 675.

(*t*) *Evans* v. *Bremridge*, 8 De G. M. & G. 100.

(*u*) *Exp. Gifford*, 6 Ves. 805; *Whiting* v. *Burke*, L. R. 6 Ch. 342; *Exp. Snowdon*, 17 Ch. D. 44, C. A.; *Re Ennis*, *Coles* v. *Peyton*, (1893) 3 Ch. 238, C. A.

(*x*) *Mercantile Bank of Sydney* v. *Taylor*, (1893) A. C. 317, P. C.

(*y*) *Eyre* v. *Bartrop*, 3 Madd. 221; cf. *Faber* v. *Lathom*, 77 L. T. 168.

(*z*) *Bolton* v. *Salmon*, (1891) 2 Ch. 48. And see *Greenwood* v. *Francis*, (1899) 1 Q. B. 312, as to time given by one co-surety.

SECTION III.

OF THE LIABILITY OF SURETIES.

Liabilities and rights of surety regulated by instrument of guaranty.

i.—**Nature of Liability.**—Inasmuch as the guaranty must be in writing, which cannot, generally speaking, be explained or varied by parol evidence (*a*), it follows that the liabilities and rights of the surety are regulated by the express or implied terms of the instrument of suretyship. When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived (*b*). So, where the principal and the surety are bound jointly, but it is alleged that the intention was that they should be bound jointly and severally, the Court will not alter the instrument on conjecture (*c*). Where, however, a guaranty is not explicit in its terms, it must, like every other contract, be construed reasonably with regard to the surrounding circumstances of the case (*d*). A covenant by a surety to pay interest on the mortgage money "during the continuance of the security" was held to render him liable to pay the interest after default of the principal in payment of the mortgage money on the day fixed, so long as any principal money remained unpaid (*e*).

Creditor has immediate right of action against surety on default of principal.

In the absence of stipulation to the contrary, so soon as the principal has made default in payment of the debt for which the surety is responsible, the creditor has an immediate right of action against the surety, without first suing the principal (*f*). Where, however, a guaranty was expressly given on condition that no application should be made to the surety for payment, but on failure of the "utmost efforts and legal proceedings" of the creditors to obtain payment from the principal, it was held that the creditors, not having shown that they had used their utmost efforts against the principal, could not maintain their action against the surety (*g*).

Creditor need not first

So, also, in the absence of stipulation, a creditor need not

(*a*) *Ante*, p. 87.

(*b*) *Sumner* v. *Powell*, 2 Mer. 30, 36.

(*c*) *Rawstone* v. *Parr*, 3 Russ. 539, reversing decision of M. R., *S. C.*, *ibid.* 424.

(*d*) *Lloyd's* v. *Harper*, 16 Ch. D. 290, 303. And see *Laurie* v. *Scholefield*, L. R. 4 C. P. 622; *Coles* v. *Pack*, L. R. 5 C. P. 65.

(*e*) *King* v. *Greenhill*, 6 Man. & Gr. 59. See *Faber* v. *Lathom*, 77 L. T. 168.

(*f*) *Wright* v. *Simpson*, 6 Ves. 714, at pp. 732, 733. See *Padwick* v. *Stanley*, 9 Ha. 627.

(*g*) *Holl* v. *Hadley*, 2 A. & E. 758.

realize securities.

first resort to securities given to him by the principal debtor before suing the surety (*h*), even where the guaranty contained a stipulation that the creditor should not sue the surety until he had availed himself of all *bonâ fide* securities held by him of the principal debtor (*i*).

Demand on debtor not necessary.

It has been repeatedly held that the creditor need not even make any demand upon the principal debtor before suing the surety (*k*), unless by the terms of the contract the debt is made payable only on demand (*l*).

Creditor need not generally give notice to surety of default of principal.

So, also, generally, the creditor need not make any demand for payment on the surety himself (*m*), or even inform the surety of default having been made by the principal (*n*). But the omission to give notice might possibly affect the question of costs; and a surety whose principal has not admitted the debt, and who has received no particulars of demand, will be allowed to defend an action on a specially-indorsed writ without paying money into Court or giving security (*o*).

Exception where stipulation to the contrary expressed,

The terms of the contract of suretyship may, however, expressly stipulate that demand of payment or notice of default shall be made upon or given to the surety, in which case the right of action against him will not arise until the condition has been complied with (*p*).

—or implied.

So, also, there may be a necessary implication from the terms of the contract that notice should be given to the surety before suing him (*q*).

No privity of contract between principal and surety.

Generally speaking, there is no privity of contract between the surety and the principal debtor (*r*); consequently no act of the principal can enlarge the guaranty, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due and which alone the surety was liable to pay (*s*).

(*h*) *Wright* v. *Simpson*, *sup.*; *Wilks* v. *Heeley*, 1 C. & M. 249.

(*i*) *Musket* v. *Rogers*, 5 Bing. N. C. 728.

(*k*) *Warrington* v. *Furbor*, 8 East, 242; *Holborow* v. *Wilkins*, 1 B. & C. 10; *Rede* v. *Farr*, 6 M. & S. 121; *Lilly* v. *Hewitt*, 11 Pri. 494; *Walton* v. *Maskall*, 13 M. & W. 452; *Belfast Banking Co.* v *Stanley*, 15 W. R. 689.

(*l*) *Re Brown's Estate, Brown* v. *Brown*, (1893) 2 Ch. 300.

(*m*) *Hitchcock* v. *Humfrey*, 5 Man. & Gr. 539.

(*n*) *Cutler* v. *Southern*, 1 Wms. Saund. 115; *Kerr* v. *Mitchell*, 2 Chit. G. P. 487. See *Carr* v. *Brown*, 12 Moo. 62.

(*o*) *Lloyd's Banking Co.* v. *Ogle*, 1 Ex. D. 262.

(*p*) *Sicklemore* v. *Thistleton*, 6 M. & S. 9; *Batson* v. *Spearman*, 9 A. & E. 298; *Phillips* v. *Fordyce*, 2 Chit. 676. See *Payne* v. *Lees*, 3 D. & Ry. 664.

(*q*) *Morten* v. *Marshall*, 9 Jur. N. S. 651.

(*r*) *Dangerfield* v. *Thomas*, 9 A. & E. 292.

(*s*) *Exp. Young*, *Re Kitchin*, 17 Ch. D. 668, per James, L. J., at p. 671.

Surety not liable till default of principal.

It is, of course, of the essence of a guaranty that there should be a principal primarily liable for the payment of the debt (*t*), and that the principal should have made default before the surety can be sued (*u*).

When surety may be bound, though principal is not bound.

But it does not follow that if the principal debtor is not bound, as where the borrowing the money was *ultra vires*, the surety will be freed from liability. So, where a company having no power to borrow money entered into a contract with another company for the sale of certain rolling stock, and for the rehiring of the same by the former company, and three of the directors of the vendor company guaranteed the payment of the rent, Kay, J., held that (1) the transaction was a loan on mortgage, and (2) that the guaranty was valid and binding on the sureties (*x*).

Liability of surety may continue after discharge of principal in bankruptcy.

ii.—Extent of Liability.—The liability of the surety to the creditor may continue after the liability of the principal debtor has ceased (*y*). It is provided by the Bankruptcy Act, 1883 (*z*), that an order discharging a bankrupt shall not release any person who was surety or in the nature of surety for the bankrupt.

Effect of discharge of principal under a composition.

So it has been repeatedly held, that if the principal debtor is discharged by resolution of the creditors under a composition, the surety remains liable (*a*). And by the Bankruptcy Act, 1890 (*b*), it is enacted that—" The acceptance by a creditor of a composition or scheme shall not release any person who, under the principal Act and this Act, would not be released by an order of discharge if the person had been adjudged bankrupt."

Effect of extinguishment of debt by composition on securities given by surety.

In general, the composition deed extinguishes the debt, and with it all collateral securities in the hands of the creditor, whether given at the time of or antecedent to the composition (*c*). But how far it is competent for a creditor to retain his right to

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(*t*) *Birkmyr* v. *Darnell*, Salk. 27; *Chapleo* v. *Brunswick Permanent Building Soc.*, 6 Q. B. D. 696.

(*u*) *Walker* v. *British Guarantee Assoc.*, 18 Q. B. D. 277. See *King* v. *Cole*, 15 Q. B. 628; *Lloyd's* v. *Harper*, 16 Ch. D. 290, C. A.

(*x*) *Yorkshire Wagon Co.* v. *Maclure*, 19 Ch. D. 478; reversed on point (1) by C. A. 21 Ch. D. 309.

(*y*) *Re London Chartered Bank of Australia*, (1893) 3 Ch. 540; *ante*, p. 89.

(*z*) 46 & 47 Vict. c. 52, s. 30, sub-s. (4).

(*a*) *Re Jacobs*, L. R. 10 Ch. 211; *Ellis* v. *Wilmot*, L. R. 10 Ex. 10; *Megrath* v. *Gray*, L. R. 9 C. P. 216, disapproving of *Wilson* v. *Lloyd*, L. R. 16 Eq. 60. And see *Cragoe* v. *Jones*, L. R. 8 Ex. 81; *Exp. Agra Bank*, *Re Barber & Co.*, L. R. 9 Eq. 725.

(*b*) 53 & 54 Vict. c. 71, s. 3, sub-s. (19). See (1905) 1 K. B. 462.

(*c*) *Cockshott* v. *Bennett*, 2 T. R. 763; *Cowper* v. *Green*, 7 M. & W. 633; *Lewis* v. *Jones*, 4 B. & Cr. 506; *Cragoe* v. *Jones*, L. R. 8 Ex. 81.

securities given by a surety does not seem in all cases clear. If such a reservation be contained in the composition deed, then, whether the surety be a party to such deed or not, the remedy against the surety is kept alive, and he has his remedy over against the debtor (*d*); nor does the assent of the surety to the composition deed containing such a reservation of remedies put the surety in the same situation as if he had applied to a Court of Equity to sue in the place of the creditor, and had been permitted to use his name upon payment of the debt into Court (in which case it is said he would not have been allowed afterwards to recover over the residue against the principal); to effect this there must be a stipulation that the surety shall stand in the creditor's place (*e*); but if the other creditors are not parties to such agreement for a reservation of remedies against the surety, the agreement seems to be invalid as a fraud upon them, unless the surety thereby deprives himself of any remedy over against the principal debtor (*f*); and even then the case seems not quite free from doubt, when the effect of the composition is to extinguish the debt (*g*). In cases of this nature it is incumbent upon the surety, when sued by the creditor, to prove want of knowledge, on the part of the other creditors, of the agreement for the reservation of remedies against the surety (*h*).

Liability of surety's estate continues after his death.

In the absence of stipulation to the contrary, a guaranty, the consideration for which is given once for all, cannot be determined by the surety, and does not cease at his death; but it would seem that if the guaranty is for a present loan and future advances, the surety, or his representatives after his death, may, by notice, determine the liability in respect of advances made after the notice has been given (*i*). It is, of course, competent for the surety to stipulate in the instrument of guaranty that on notice he shall be discharged from all future liability (*k*).

(*d*) *Exp. Gifford*, 6 Ves. 805; *Boultbee* v. *Stubbs*, 18 Ves. 20; *Kearsley* v. *Cole*, 16 M. & W. 128; *North* v. *Wakefield*, 18 L. J. Q. B. 214; *Bateson* v. *Gosling*, L. R. 7 C. P. 13; *Nicholson* v. *Revill*, 4 A. & E. 683; *Price* v. *Barker*, 1 Jur. N. S. 775.

(*e*) *Kearsley* v. *Cole*, 16 M. & W. 128. And see note to *Lewis* v. *Jones*, 4 B. & C. 506, 515, supposed to have been written by Holroyd, J., or by Cresswell, J., L. R. 7 C. P. 14.

(*f*) Note to *Lewis* v. *Jones*, *sup.*; *Davidson* v. *M'Gregor*, 8 M. & W. 755. But see *Thomas* v. *Courtnay*, 1 B. & Ald. 1; *Cowper* v. *Smith*, 4 M. & W. 519.

(*g*) See *Lewis* v. *Jones*, *sup.*

(*h*) *Davidson* v. *M'Gregor*, *sup.*

(*i*) *Lloyd's* v. *Harper*, 16 Ch. D. 290, C. A. See *Re Silvester*, *Midland Rail. Co.* v. *Silvester*, (1895) 1 Ch. 573; *Re Crace*, (1902) 1 Ch. 733.

(*k*) *Calvert* v. *Gordon*, 3 Man. & Ry. 124, 128.

In the case of a guaranty of several sureties, which is joint only, the death of one guarantor puts an end to the guaranty, unless the survivors expressly or by implication from conduct agree that it shall continue (*l*).

Limitation of liability by express stipulation.

The parties to a contract of suretyship may limit the liability of the surety as to duration of time, or as to amount, or other matters, or may make the liability depend on conditions precedent, the fulfilment of which will be necessary to give rise to the liability (*m*).

Effect of recitals.

In order to ascertain the intention of the parties the instrument of guaranty must be considered as a whole; and for this purpose the operation of the instrument may be controlled by the recitals (*n*).

Suretyship for whole debt limited to a less sum.

A guaranty of the whole debt, with a limit on the surety's liability in point of amount, is to be distinguished from a guaranty of part only of the debt (*o*).

Change in firm.

Where one of several partners gives the collateral security of his own separate real estate for future advances, to be made to the firm, to a certain amount, the collateral security will determine on the death of any one of the partners as to any advances not then made, unless the guaranty be clearly intended to be a continuing one (*p*); so a surety for a customer with a bank, who has there a running account, is discharged by any change in the banking firm, as to any sums not actually due at the time of such change (*q*).

A security may expressly (*r*), or by implication from the circumstances (*s*), extend to advances and transactions made or entered into after a change in the firm (*t*). Such implication may arise from the nature of the firm, as in the case of a society or company (*u*).

And a security given to or by a banking company may be

(*l*) *Ashby* v. *Day*, 54 L. T. 408, C. A.

(*m*) *Burton* v. *Gray*, L. R. 8 Ch. 932; *Re Denton*, (1904) 2 Ch. 178.

(*n*) *Glyn* v. *Hertel*, 8 Taunt. 208; *Pearsall* v. *Somerset*, 4 Taunt. 593. See also *Bamford* v. *Iles*, 3 Exch. 380; *Peppin* v. *Cooper*, 2 B. & Ald. 431; *Kitson* v. *Julian*, 4 E. & B. 854; *Hassell* v. *Long*, 2 M. & S. 362.

(*o*) *Ellis* v. *Emmanuel*, 1 Ex. D. 157; *Re Denton*, *sup.*

(*p*) *Bank of Scotland* v. *Christie*, 8 Cl. & F. 214; Partnership Act, 1890, s. 18.

(*q*) *Pemberton* v. *Oakes*, 4 Russ. 154; *Bodenham* v. *Purchas*, 2 B. & Ald. 39; *Exp. Marsh*, 2 Rose, 239; *Strange* v. *Lee*, 3 East, 484; *Exp. Kensington*, 2 V. & B. 79; *Backhouse* v. *Hall*, 6 B. & S. 507.

(*r*) *Strange* v. *Lee*, *sup.*

(*s*) *Metcalf* v. *Bruin*, 12 East, 400.

(*t*) *Exp. Lloyd*, 3 Dea. 305.

(*u*) *Metcalf* v. *Bruin*, *sup.*

shown to be intended to be a continuing security notwithstanding a change in the firm (*x*).

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SECTION IV.

OF THE RIGHTS OF A SURETY.

Right of surety to compel principal to pay debt.

i.—Rights of Action, &c.—Before the surety has paid or has been called upon to pay anything under his guaranty, he is entitled, so soon as the principal debtor has made default, to obtain relief in equity by compelling the principal debtor to pay off the debt and so discharge his liability (*y*). "Although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond, this Court will decree the principal to discharge the debt, it being unreasonable that a man should always have such a cloud hanging over him" (*z*). To support such an action, it is not necessary that the creditor should have refused to sue the principal debtor (*a*).

Right of surety to compel creditor to sue principal.

It would seem that the surety may also, before he has been called upon to pay anything under his guaranty, upon default of the principal debtor, bring an action against the creditor to compel him to enforce his remedies against the principal debtor (*b*).

Other rights of surety who has not paid anything.

Though the surety has not himself paid anything, if the debt has been satisfied *aliunde* in equity, he may, since the Judicature Act, 1873 (*c*), rely on such satisfaction as a defence to any action which might, but for that Act, have been brought against him in respect of his continuing obligation at law. He may also obtain a declaration discharging him from liability, where dealings between the creditor and the principal debtor have operated as a release (*d*); and, in a case of this nature, the Court ordered the instrument under which the surety's liability arose to be set aside and cancelled (*e*).

(*x*) *Pease* v. *Hirst*, 10 B. & C. 122.

(*y*) *Antrobus* v. *Davidson*, 3 Mer. 569, 579; *Lee* v. *Rook*, Mos. 317; *Nisbet* v. *Smith*, 2 Bro. C. C. 579, 582; *Wooldridge* v. *Norris*, L. R. 6 Eq. 410; *Ascherson* v. *Tredegar*, *inf.*

(*z*) *Ranelaugh* v. *Hayes*, 1 Vern. 189, per Ld. North.

(*a*) *Mathews* v. *Saurin*, 31 L. R. Ir. 181; *Ascherson* v. *Tredegar*, *&c.*, (1909) 2 Ch. 401.

(*b*) *Wright* v. *Simpson*, 6 Ves. 714, 733; *Boultbee* v. *Stubbs*, 18 Ves. 20.

(*c*) 36 & 37 Vict. c. 66, s. 34, sub-s. 5.

(*d*) *Wilson* v. *Lloyd*, 21 W. R. 507. See *Exp. Bishop*, *Re Fox*, *Walker & Co.*, 15 Ch. D. 400, C. A.

(*e*) *Blest* v. *Brown*, 4 De G. F. & J. 367.

Right to damages for principal's default.

If the principal debtor gives to the surety a counter-bond or covenant to pay the amount due to the creditor on a specified day, and makes default, the surety can bring his action for damages on the bond or covenant (*f*).

Rights of surety when called on to pay.

If a surety is called upon to pay a debt under his guaranty, he is entitled to compel the creditor having another fund which the surety, if he pays the debt, cannot make available, to resort to that fund in the first instance (*g*).

Right to set off debt due from creditor to principal.

A surety who is being sued by the creditor may set off a debt due by the creditor to the principal debtor arising out of the transaction on which the liability arises (*h*).

Right to sign judgment against principal.

A surety having from his principal a special promise to indemnify him against "any risk, damage, or costs which might arise to him as surety" is entitled, on being sued by the creditor, to sign judgment against the principal under R. S. C., Ord. XVI. r. 55, before he has actually paid anything in discharge of the liability (*i*).

Right of surety to pay off debt voluntarily, and his remedies thereupon.

So soon as the appointed time of payment arrives, but not before, the surety may, without the assent of, or notice to, the principal debtor, voluntarily pay off the debt; and if he does so, he will acquire the same rights and remedies as against the principal debtor, the creditor and his co-sureties, if any, respectively, as if he had made the payment on the demand of the creditor (*k*).

Rights of surety after payment to recover from principal.

After the surety has actually made any payment on account of the debt guaranteed by him, he may at once sue the principal debtor for repayment of the amount so paid, "even though the surety did not pay the debt by the desire of the principal" (*l*). The right of the surety to sue the principal to recover money paid by him arises as soon as he has paid anything on account of the debt (*m*).

Guaranty must be at request of principal.

In order, however, to entitle the surety to recover from the principal, the guaranty must have been given at the request of the principal (*n*).

(*f*) *Penny* v. *Foy*, 8 B. & C. 11; *Loosemore* v. *Radford*, 9 M. & W. 657.

(*g*) *Exp. Kendall*, 17 Ves. 514.

(*h*) *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372.

(*i*) *English and Scottish Mercantile Investment Trust* v. *Flatau*, 36 W. R. 238.

(*k*) *Davies* v. *Humphreys*, 6 M. & W. 153; *Newton* v. *Chorlton*, 10 Ha. 646, 652.

(*l*) Per Ld. Kenyon, C. J., in *Exall* v. *Partridge*, 8 T. R. 308, 310. See *Warrington* v. *Furbor*, 8 East. 242.

(*m*) *Davies* v. *Humphreys*, 6 M. & W. 153, at p. 167.

(*n*) *Jones* v. *Broadhurst*, 9 C. B. 173, 193 *et seq.*; *James* v. *Isaacs*, 12 C. B.

Consideration between them unnecessary.

It is not necessary, however, that there should be any consideration moving from the principal debtor to the surety in order to render the contract of suretyship valid, so as to entitle the surety to his remedies against the principal (*o*).

Implied contract for indemnity of surety.

ii.—**Right to Indemnity.**—In the absence of any express contract to the contrary, a principal is liable, upon an implied promise, to indemnify his surety from any loss that he may sustain in that character (*p*). This liability will continue notwithstanding the acceptance by the creditor of a composition from the principal, if by the composition deed the creditor reserves his rights against the surety (*q*).

Formerly surety had no right to transfer of specialties, &c.

A surety paying off a debt formerly became a simple contract creditor only of the principal debtor for the amount so paid, and was not entitled to the benefit of any personal obligation of the nature of a specialty existing between the principal and the creditor by virtue of any covenant or otherwise (*r*). But by the Mercantile Law Amendment Act, 1856 (*s*), a surety is entitled to have assigned to him every security held by his principal and to stand in the place of his principal, but no co-surety is entitled to recover from another co-surety more than the proportion to which he is liable.

But now he is entitled to an assignment of all securities.

Assignment of securities not necessary.

The right of a surety who has paid off the principal's debt to stand in the place of the creditor is not affected by the fact that the surety has not actually obtained an assignment of the securities for the debt (*t*).

Act applies to co-debtors.

This statute applies to a co-debtor as well as to a surety, and gives a right to an assignment of a judgment against the debtors, although by discharge of the debt the judgment is satisfied (*u*).

When specialty of surety is created.

Although under this provision a surety who discharges a specialty debt becomes a specialty creditor of the principal debtor, a specialty debt is not created by reason of the enforce-

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791; *Cook* v. *Lister*, 13 C. B. N. S. 543, 594; *Kemp* v. *Balls*, 10 Exch. 607.

(*o*) *Exp. Minet*, 14 Ves. 190.

(*p*) *Toussaint* v. *Martinnant*, 2 T. R. 100; *Pownalt* v. *Ferrand*, 6 B. & C. 439. See *Duffield* v. *Scott*, 3 T. R. 374.

(*q*) *Close* v. *Close*, 4 De G. M. & G. 176.

(*r*) *Copis* v. *Middleton*, T. & R. 224.

(*s*) 19 & 20 Vict. c. 97, s. 5.

(*t*) *Lightbown* v. *M'Myn*, 33 Ch. D. 575.

(*u*) *Batchellor* v. *Lawrence*, 9 C. B. N. S. 543. See *Re Swan*, Ir. R. 4 Eq. 209; *Silk* v. *Eyre*, Ir. R. 9 Eq. 393.

ment by the surety of his right to indemnity against a specialty debt for which he is liable, but which he has not discharged (*x*).

Right of surety to benefit of securities held by the creditor.

Independently of the statute, a surety who pays off the mortgage debt, or any part thereof, being the whole remaining due (*y*), is entitled to the benefit of every security which the mortgagee has against the principal debtor (*z*), whether the surety was or was not aware of the existence of the securities (*a*), and even though the securities are taken by the creditor after the contract of suretyship was entered into (*b*).

Thus, for example, if a bond is given by principal and surety, and at the same time a mortgage is executed by the principal debtor to the creditor without the knowledge of the surety for securing the debt, the surety paying off the bond debt will be entitled to stand in the place of the creditor in respect of the mortgage (*c*). So, if there be but one specialty, viz., the mortgage, the surety being bound as such by simple contract only (*d*).

Exception where part only of debt is guaranteed.

The above doctrine does not, however, apply where the surety guarantees one part of the debt, and the security is given for another part (*e*), but it applies when the security is given subsequently though by an independent transaction (*f*).

Right only arises where the debt is wholly paid off.

A surety will not be entitled as against the creditor to the benefit of the security unless he has paid the whole debt, or so much thereof as for the time being remains unpaid (*g*). It is, however, certainly not the law that a surety has no rights until he pays the debt due from his principal (*h*).

Effect where principal gives further security.

The right of the surety to the principal security is not affected by a further mortgage by the mortgagor to a person who had notice of the first mortgage, though the subsequent mortgagee has got in the legal estate (*i*).

(*x*) *Fergusson* v. *Gibson*, L. R. 14 Eq. 379.

(*y*) *Ewart* v. *Latta*, 4 Macq. H. L. 983.

(*z*) *Mayhew* v. *Crickett*, 2 Swanst. 191; *Allen* v. *De Lisle*, 3 Jur. N. S. 928; *Goddard* v. *Whyte*, 2 Giff. 449.

(*a*) *Lake* v. *Brutton*, 8 De G. M. & G. 440; *Duncan* v. *North and South Western Bank*, 6 App. Ca. 1; *Hodgson* v. *Shaw*, 3 My. & K. 183, at p. 191.

(*b*) *Forbes* v. *Jackson*, 19 Ch. D. 615. See *Pledge* v. *Buss*, Johns. 663; *Lake* v. *Brutton*, *sup.*

(*c*) *Copis* v. *Middleton*, T. & R. 231.

(*d*) *Hodgson* v. *Shaw*, 3 My. & K. 195.

(*e*) *Wade* v. *Coope*, 2 Sim. 155; *South* v. *Bloxam*, 2 H. & M. 457.

(*f*) *Pledge* v. *Buss*, Johns. 663. And see *Lake* v. *Brutton*, 8 De G. M. & G. 440.

(*g*) *Waugh* v. *Wren*, 9 Jur. N. S. 365; 11 W. R. 244. But see (1896) 2 Q. B. 12.

(*h*) *Dixon* v. *Steel*, (1901) 2 Ch. 602, per Cozens-Hardy, J.

(*i*) *Drew* v. *Lockett*, 32 Beav. 499. And see *Bowker* v. *Bull*, 1 Sim. N. S. 29; *Lancaster* v. *Evors*, 10 Beav. 154. See further as to tacking against sureties, *post*, Chap. LV., Sect. II.

Chap. IX. § 4 (ii.)

Where a prior debt exists.

Where the mortgagor has given a collateral security for the original debt and borrows a further sum, which is guaranteed by the surety, the latter is entitled to the surplus value of the securities after payment of the original debt towards payment of that for which he is surety (*k*).

Surety for Crown debtor.

A surety for a Crown debtor may obtain an order to stand in the place of the Crown and to have the benefit of an extent (*l*), which will give him priority over subsequent mortgagees and execution creditors of the principal (*m*).

Indemnity on other property.

If the surety take from his principal by way of indemnity a security upon other property, he loses his right to the principal security (*n*), unless he did so in ignorance of the principal security, which was available for his indemnity (*o*).

Securities given by principal to surety.

When the principal debtor has deposited the title deeds of an estate with, and conveyed the estate to, the surety, by way of indemnity against his liability under a joint bond, although the surety or his executors be induced, by a false representation of the debtor, to deliver up the title deeds, that will not give the debtor a right to call for a reconveyance until the indemnity is fully carried out (*p*).

A creditor is not entitled to the benefit of securities given by the principal debtor to a surety by way of indemnity (*q*).

Right of surety as against puisne incumbrancers.

If money be paid by a surety in discharge of a security, which afterwards proves to be sufficient, the surety is entitled to be reimbursed before subsequent incumbrancers of the mortgaged property (*r*).

Right of surety to preservation of security.

The surety for a debt has also an equitable right to the preservation of the security by reason of his liability to pay the debt; but as the wasting of the security by the default of the creditor causes the release *pro tanto* of the surety, it is unnecessary for the latter to take active steps to maintain his rights.

Upon an assignment by the mortgagee the obligation of preserving the securities for the surety attaches upon the assignee (*s*).

(*k*) *Praed* v. *Gardiner*, 2 Cox, 86; *Copis* v. *Middleton*, T. & R. 224; *Hodgson* v. *Shaw*, 3 My. & K. 183, 195. But see *Allen* v. *De Lisle*, 5 W. R. 158.

(*l*) *Reg.* v. *Salter*, *Reg.* v. *Robinson*, 1 H. & N. 274, 275, n.

(*m*) See *post*, Chap. LIX., Sect. II.

(*n*) *Cooper* v. *Jenkins*, 32 Beav. 337.

(*o*) *Lake* v. *Brutton*, 8 De G. M. & G. 440; *Brandon* v. *Brandon*, 3 De G. & J. 524.

(*p*) *Tyson* v. *Cox*, T. & R. 395.

(*q*) *Exp. Waring*, 19 Ves. 345; *Re Walker*, *Sheffield Banking Co.* v. *Clayton*, (1892) 1 Ch. 621.

(*r*) *Sawyer* v. *Goodwin*, 1 Ch. D. 351, C. A.

(*s*) *Wheatley* v. *Bastow*, 7 De G. M. & G. 261.

But though a mortgagor made liable on his covenant has an implied right of indemnity against the assignee of the equity of redemption, the surety for the mortgagor has no such right (*t*).

Right of surety to set off debt due by him to principal.

Where the surety pays off the debt of the mortgagor and becomes entitled to all the securities, he may set off the amount paid against a debt due by himself to the owner of the equity of redemption (*u*); and if such owner is a company, he may set it off against calls as if he had been mortgagee when they fell due (*u*); and this he may do in bankruptcy, notwithstanding the principle which prevents a debt assigned after the bankruptcy from being set off against a debt to the bankrupt's estate.

Surety entitled to benefit of voluntary payments.

A surety will have the benefit of voluntary payments made, in respect of a charge on the estates by the agent of the debtor, in expectation of rents coming into his hands, though such fund fails; and neither the creditor nor the agent will be allowed to enforce against the surety the securities given by him to the creditor to the extent of the sums so paid (*x*); and similarly, in the well-known case of *Godsall* v. *Boldero*, the insurance office was allowed the benefit of the payment, made by the public, of the debt insured against (*y*). But if the insurers pay the sum insured in their own wrong (that is, either when the creditor has no insurable interest in the life insured, or the contingency, which was insurable, has failed in coming to pass), the debtor cannot have the benefit of such payment in reduction of his debt (*z*).

Payment of debt by one co-surety.

iii.—Right to Contribution from Co-sureties.—If one of several co-sureties pays off the debt, he may recover against any one of the others his proportion of the money so paid (*a*).

So, if one surety pays more than his proportion, he will be entitled to a contribution for a proportion of the excess (*b*), provided the other is strictly a co-surety and not a collateral guarantor (*c*). But a surety, who has not been called upon to pay, and has not paid more than his share, cannot claim contribution from his co-sureties, although they have paid nothing, as there is no legally ascertained debt (*d*). If, however, the

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(*t*) *Re Law Courts Chambers Co.*, 61 L. T. 669.

(*u*) *Exp. Barrett*, 34 L. J. Bky. 41.

(*x*) *Williamson* v. *Goold*, 1 Bing. 171.

(*y*) 9 East, 71.

(*z*) *Henson* v. *Blackwell*, 4 Ha. 434.

(*a*) *Cowell* v. *Edwards*, 2 B. & P. 268; *Dering* v. *Winchelsea*, 2 B. & P. 270.

(*b*) *Exp. Gifford*, 6 Ves. 808.

(*c*) *Re Denton*, (1904) 2 Ch. 178, C. A., *post*, p. 107.

(*d*) *Davies* v. *Humfreys*, 6 M. & W. 153; *Exp. Snowdon*, 17 Ch. D. 44, C. A.

creditor has actually obtained judgment against one of several co-sureties for the full amount of the debt guaranteed, such surety, though he has actually paid nothing, may enforce his right to contribution against his co-sureties (*e*). Formerly, at law, only the aliquot part of the money could be recovered from each surety, though one or more of the sureties were insolvent (*f*); but, according to the present practice of the Courts, following the principles formerly adopted in equity, the insolvent co-sureties are struck out and the rest are made to contribute equally (*g*). If one co-surety, however, becomes bankrupt, a surety who has paid more than his aliquot proportion, having regard to the original number of sureties, may prove for contribution against the bankrupt surety's estate (*h*), or if proof has already been made by the creditor, such surety may stand in the creditor's place (*i*).

If one of several co-sureties, who are jointly and severally liable, dies during the continuance of the guaranty, contribution may be enforced against his representatives (*k*).

Foundation of right to contribution.

The doctrine of contribution amongst sureties is not founded upon contract, but on general principles of justice requiring equality of burden and benefit. Therefore, it makes no difference whether the sureties are bound jointly and severally, or jointly only, or severally only; nor will it make any difference if they are bound by different instruments but for the same debt, even though one person becomes surety by a separate instrument without the knowledge of another surety (*l*).

There is, however, this distinction, that where sureties enter into separate bonds, the penalties of those distinct bonds will ascertain the proportion in which they are to contribute; but, if they join in one bond, then they must contribute equally (*m*).

Right of co-surety to have securities brought into hotchpot.

Any security obtained by one of several co-sureties from the principal debtor must generally be brought into hotchpot, and

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(*e*) *Wolmershausen* v. *Gullick*, (1893) 2 Ch. 514.

(*f*) *Cowell* v. *Edwards*, 2 B. & P. 268.

(*g*) See *Lawson* v. *Wright*, 1 Cox, 275; *Cockburn* v. *Thompson*, 16 Ves. 321; *Lowe* v. *Dixon*, 16 Q. B. D. 312.

(*h*) *Adkins* v. *Farrington*, 5 H. & N. 586; 29 L. J. Ex. 345.

(*i*) *Exp. Stokes*, De G. 618; *Re Parker*, *post*, p. 108.

(*k*) *Primrose* v. *Bromley*, 1 Atk. 88; *Bastard* v. *Hawes*, 2 E. & B. 287.

(*l*) *Dering* v. *Winchelsea*, 1 Cox, 322; *Craythorne* v. *Swinburne*, 14 Ves. 160, 165, 169; *Whiting* v. *Burke*, L. R. 6 Ch. 342.

(*m*) *Dering* v. *Winchelsea*, 1 Cox, 322.

will enure for the common benefit of all the co-sureties, even though the giving of such security may have been the condition on which the person taking it consented to become the surety, and though the other co-sureties may have been ignorant that the security had been given (*n*).

A surety cannot have contribution from his co-sureties unless he brings in whatever he has received from the principal debtor; *e.g.*, policy moneys under an insurance on the debtor's life (*o*).

Although the right of contribution among sureties is not founded on contract, but on general principles, yet the right may be qualified by contract (*p*), or may thereby be altogether excluded, so as to render a surety not liable to contribute in any degree (*q*).

So, a contract limiting or negativing liability to contribute may be implied from the circumstances of the transaction (*r*).

There is also a distinction between cases where several persons are strictly co-sureties, and where one person is collateral surety for the principal and the other surety; thus, where a person gave a separate bond as a supplemental security for the payment of a debt in default of its being paid by the principal or his surety under a former bond, it was held that he was not liable to contribution in favour of the original surety, the latter being, as to the subsequent surety, a principal (*s*).

But where three sureties gave a bond to mortgagees by which they agreed not to be released by time being given to the mortgagor, and two of them paid off the debt, took an assignment of the bond and gave time to the mortgagor, it was held that the other co-surety was liable to contribute (*t*).

Rights of surety on principal's bankruptcy.

iv.—Right to Proof in Bankruptcy.—If the principal debtor becomes bankrupt, the surety may compel the creditor to prove against the estate for the amount due (*u*).

(*n*) *Steel* v. *Dixon*, 17 Ch. D. 825. See also *Re Arcedeckne*, *Atkins* v. *Arcedeckne*, 24 Ch. D. 709; *Berridge* v. *Berridge*, 44 Ch. D. 168.

(*o*) *Re Arcedeckne*, *Atkins* v. *Arcedeckne*, *sup.*

(*p*) *Swain* v. *Wall*, 1 Rep. in Ch. 149.

(*q*) *Pendlebury* v. *Walker*, 4 Y. & C. Ex. 424; *Craythorne* v. *Swinburne*, 14 Ves. 165; *Re Denton*, (1904) 2 Ch. 178, C. A.

(*r*) *Coope* v. *Twynam*, T. & R. 426.

(*s*) *Craythorne* v. *Swinburne*, 14 Ves. 160, 171; *Re Denton*, *supra*.

(*t*) *Greenwood* v. *Francis*, (1899) 1 Q. B. 312, C. A.

(*u*) *Exp. Rushforth*, 10 Ves. 409. See *Exp. Turner*, 3 Ves. 243; *Paley* v. *Field*, 12 Ves. 435; *Jackson* v. *Magee*, 3 A. & E. 57.

On the bankruptcy of the principal, the surety, if he has paid the whole amount of the debt, may prove for the whole so paid; but if a surety for the whole debt pays only a part, he has no equity to stand in the place of the creditor for such part (*x*). If, however, a person guarantees a limited portion of a debt, and pays the whole of that portion, he has, in respect of it, all the rights of a creditor (*y*).

If a surety pays a creditor who has already tendered a proof, he is entitled to stand in such creditor's place as to securities, dividends past and future, and all other rights (*z*).

Where the principal is deceased or become bankrupt, and the mortgagee has proved the debt, the surety who has paid the debt is entitled to all the dividends, though he did not set off the dividends in the action against him by the creditor (*a*), and for a proportionate share of the dividend if he is only surety for a part of one debt (*b*). But he has no right to stand in the creditor's place if, being surety for the whole debt, he only pays the part to which his liability is limited (*c*).

It is now established that the contingent liability of a surety who has not paid or been called upon to pay forms a debt provable in the bankruptcy of the principal debtor (*d*), and that one surety can prove in the bankruptcy of a co-surety, although the proving surety has not paid the creditor anything (*e*).

Where one of several co-sureties has paid off the debt, he is entitled, notwithstanding sect. 5 of the Mercantile Law Amendment Act, 1856 (*f*), to the benefit of the creditor's proof against another co-surety for the full amount of the debt, but on the footing that he is not to receive more than the proportion which, as between the sureties, he is liable to pay (*g*).

(*x*) *Exp. Rushforth*, 10 Ves., at p. 420.

(*y*) *Hobson* v. *Bass*, L. R. 6 Ch. 792, at p. 794. See also *Exp. Holmes*, My. & Cr. 301; *Paley* v. *Field*, *sup.*; *Bardwell* v. *Lydall*, 7 Bing. 489; *Gee* v. *Pack*, 33 L. J. Q. B. 49; *Gray* v. *Seckham*, L. R. 7 Ch. 680.

(*z*) *Exp. Johnson*, 3 De G. M. & G. 218; *Forbes* v. *Jackson*, 19 Ch. D. 316.

(*a*) *Thornton* v. *McKewan*, 1 H. & M. 525; *Hobson* v. *Bass*, L. R. 6 Ch. 792; *Midland Banking Co.* v. *Chambers*, L. R. 4 Ch. 398; L. R. 7 Eq. 179; *Goodwin* v. *Gray*, 22 W. R. 312.

(*b*) *Gray* v. *Seckham*, L. R. 7 Ch. 680. See *Ellis* v. *Emmanuel*, 1 Ex. D. 157, C. A.

(*c*) *Re Sass, Exp. Nat. Prov. Bank*, (1896) 2 Q. B. 12.

(*d*) See *Hardy* v. *Fothergill*, 13 App. Ca. 351; *Re Herapath and Delmar*, 7 Mor. 129; *Re Paine, Exp. Read*, (1897) 1 Q. B. 122; *Re Blackpool Motor Car Co.*, (1901) 1 Ch. 77.

(*e*) *Wolmershausen* v. *Gullick*, (1893) 2 Ch. 514.

(*f*) *Ante*, p. 102.

(*g*) *Exp. Stokes*, De G. 618; *Re Parker, Morgan* v. *Hill*, (1894) 3 Ch. 400, C. A.

Principal and surety both bankrupt.

Where the principal and surety both become bankrupt, and the creditor has been paid in full by dividends from both estates, the trustee of the surety's estate is entitled to prove against the estate of the principal for all sums paid out of the surety's estate to the creditor (*h*).

Proof for contribution by bankrupt co-surety.

Where one of several co-sureties becomes bankrupt, his liability to contribution, though unascertained at the time of the bankruptcy proceedings, is a debt provable in the bankruptcy (*i*).

Proof against joint and separate estates of partners.

Sureties who, after payment of the debt, have received a dividend on a proof against the joint estate of a banking firm in which their principal was a partner, cannot prove against the principal's separate estate until they have applied to expunge the joint proof (*k*).

Marshalling.

The surety is entitled, as against the trustee in the principal's bankruptcy, to marshal securities so as to obtain repayment of moneys advanced to the principal on mortgage and guaranteed by the surety (*l*).

Surety can only charge principal with amount actually paid.

v.—**Extent of Surety's Rights.**—Where a surety discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the full amount, but can only claim, as against his principal, what he has actually paid in discharge of the obligation (*m*).

Right of surety to interest.

As against the principal debtor and his co-sureties, a surety is entitled to interest on sums paid by him (*n*); but as against the estate of the deceased principal he is not so entitled; though where a fund assigned as a further security had made interest, he was allowed interest out of that interest (*o*).

Interest may be recovered by a surety on the amount paid by him for the mortgagor, his principal, through the medium of the mortgage security. It seems, however, that if the charge or mortgage paid off by the surety or his estate is not kept alive, interest will not be allowed the surety on the sums so

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(*h*) *Exp. Johnson*, 3 De G. M. & G. 318.

(*i*) *Wolmershausen* v. *Gullick*, (1893) 2 Ch. 514.

(*k*) *Exp. Carne*, L. R. 3 Ch. 463.

(*l*) *Heyman* v. *Dubois*, L. R. 13 Eq. 158. See *South* v. *Bloxam*, 2 H. & M. 457; *Exp. Salting, Re Stratton*, 25 Ch. D. 148, C. A.

(*m*) *Reed* v. *Norris*, 2 My. & Cr. 361, 375.

(*n*) *Lawson* v. *Wright*, 1 Cox, 275; *Hitchman* v. *Stewart*, 3 Drew. 271; *Exp. Bishop, Re Fox, Walker & Co.*, 15 Ch. D. 400, C. A.

(*o*) *Caulfield* v. *Maguire*, 2 J. & L. 164.

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paid, though a fund which has arisen from the sale of the mortgaged estate of the principal debtor be in Court (*p*).

The surety's right of action against the principal debtor may be barred by the Statute of Limitations, but his right to contribution can be asserted against the co-surety notwithstanding that the creditor's right is barred. Time begins to run against a surety suing his co-surety for contribution as soon as his liability has actually been established, not from the time when the debt became payable (*q*).

(*p*) *Lancaster* v. *Evors*, 10 Beav. 266.

(*q*) *Wolmershausen* v. *Gullick*, (1893) 2 Ch. 514; *Gardner* v. *Brooke*, (1897) 2 Ir. R. 6.

Part II.

THE SUBJECT-MATTER OF MORTGAGES.

CHAPTER X.

MORTGAGE OF FREEHOLDS.

SECTION I.

FORMS OF MORTGAGES OF FREEHOLDS FORMERLY IN USE.

Conveyance with defeasance.

IN early times, the form of a mortgage of freeholds was simple. It consisted of a feoffment, with a condition contained in the same deed, or sometimes in a separate deed of defeasance (executed at the same time), to be void on payment of a given sum, at a given time. On performance of the condition, the mortgagor was restored to his old estate, paramount to all the charges and incumbrances of the feoffee (*a*).

The objections to a mortgage by way of absolute conveyance, with the clause of redemption in a separate deed of defeasance, were that the defeasance might be lost, and then an absolute conveyance would be set up; or that the estate might be conveyed to a *bonâ fide* purchaser without notice, in which case the right to redeem would be wholly defeated, and the mortgagor be left to his remedy against the mortgagee for the fraud. In consequence of the discouragement it received (*b*), this mode of mortgage has become obsolete.

Demise and sub-demise.

In some instances the mortgage was effected by a demise and sub-demise; that is, the mortgagor demised the lands to the mortgagee for a long term of years at a peppercorn rent, and then the mortgagee re-demised them at a pecuniary rent, which covered the interest of the money lent, and there was a condition in the original demise that, on payment of the mortgage debt

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(*a*) See *ante*, p. 4.

(*b*) See *Cotterell* v. *Purchase*, Cas. t. Talb. (Williams) 61; *Baker* v. *Wind*, 1 Ves. Sen. 160.

and interest by a given day, the original term should be at an end, upon which the derivative term would also cease. This mode of mortgage is also obsolete; but if an estate be in hand, and there is a wish to obtain a power of distress for payment of the interest of the mortgage debt, an underlease might still be resorted to. It would, however, it is apprehended, require the duty to be paid as on a *bonâ fide* lease.

Conveyance in trust.

In some cases the lands were conveyed to a trustee in fee, with a proviso authorizing him to distrain on the lands in the mortgagor's possession, in case the interest shall be in arrear for a given time, with a further declaration appointing the trustee receiver during the time the lands shall be in lease.

Warrant of attorney.

Or sometimes the mortgagor gave a power of attorney to confess judgment in ejectment in case the interest should be in arrear, with a covenant to appoint such person a receiver as the mortgagee should name, in case the lands should be let.

Mortgage of freeholds for a term of years.

Mortgages of freeholds were formerly often, and are still occasionally, effected by demise for a long term of years, attended with a condition in the same deed, that, if the principal and interest be paid within a given time, the lands shall be reconveyed ; or that the deeds of mortgage shall be void, or that the term shall cease and determine.

Form of mortgage for a term.

If the mortgage be by term of years, a covenant is usually inserted on the part of the mortgagor, that, after default made, he or his heirs will, at his own cost, do all lawful acts for confirming the term, or, if required, for conveying the reversion in fee to such persons as the mortgagee, his executors, administrators, or assigns shall direct ; for otherwise, the mortgagee would, on foreclosure, obtain a chattel interest only, and not the fee.

But if the term, having no rent incident to the reversion, was originally of not less than 300 years, of which not less than 200 years are unexpired, a mortgagee, having by foreclosure extinguished the right of redemption affecting the term in favour of the mortgagor, may, by deed, enlarge the term, and so acquire the land in fee simple (*c*); and it would seem that a mortgagee by assignment, if in possession, could, even before foreclosure, enlarge the term, though he would clearly have no such right if the mortgage were by demise (*d*).

(*c*) 44 & 45 Vict. c. 41, s. 65.
(*d*) *Ibid.* sub-s. 2, *post*, Chap. XXXV. (iv).

A benefit which formerly resulted from the mortgage being, in the first instance, for a term of years, and not in fee, was that the security and debt devolved together; but, if the mortgage was in fee, the land descended to the heir as a trustee for the executor, and the debt vested in the executor, which, in case of the infancy or absence of the heir, created inconvenience (*e*). This inconvenience was remedied by the Vendor and Purchaser Act, 1874 (*f*), which enabled the personal representative of a mortgagee, on being paid, to reconvey the legal fee. This enactment has been repealed by the Conveyancing Act, 1881 (*g*). In cases of deaths after the commencement of the last-mentioned Act, by s. 30 of that Act, an estate or interest of inheritance, or limited to the heir as special occupant, in any hereditaments vested in a sole mortgagee, devolves on his personal representative (*h*). The Land Transfer Act, 1897, s. 1, extends the same principle to cases of beneficial ownership.

Mortgages for terms now unusual.

A disadvantage of a mortgage for a term is, that the mortgagee, unless by special stipulation, is not entitled to the custody of the title deeds (*i*). In modern practice, mortgages for a term are almost universally abandoned, except where it is desired to raise money on the security of an estate tail without barring the entail further than is necessary for the purpose of giving effect to the security (*k*), as in the case of a lunatic tenant in tail (*l*); and also except in the case of trustees of settlements, in whom long terms of years are vested in trust to raise money for portions and other purposes.

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SECTION II.

FORM OF MORTGAGE OF FREEHOLDS ACCORDING TO MODERN PRACTICE.

Form of mortgage in fee.

i.—General Scheme of Arrangement of a Mortgage Deed. —In modern practice, mortgages of freeholds are usually made either in fee or for such other freehold interest as the mortgagor has in the lands.

(*e*) See per Lord Redesdale in *Schoole and Wife* v. *Sall*, 1 Sch. & L. 176.

(*f*) 37 & 38 Vict. c. 78, s. 4.

(*g*) 44 & 45 Vict. c. 41.

(*h*) See *post*, Chap. XLII., Sect. V.

(*i*) *Wiseman* v. *Westland*, 1 Y. & J. 117.

(*k*) See Fines and Recoveries Act (3 & 4 Will. IV. c. 74), s. 21; Carson, R. P. Stat. p. 282.

(*l*) *Re Pares*, 2 Ch. D. 61, C. A.

A legal mortgage of freehold land in fee simple may be regarded as furnishing the normal type of a mortgage security. It is therefore proposed in this place to consider in detail the form and contents of such a mortgage, and to point out later, as occasion shall arise, such variations as are necessary or convenient in making mortgages of different kinds of property other than freeholds.

Arrangement of clauses in mortgage deed.

The present practice with regard to the arrangement of clauses in mortgage deeds is usually as follows:—After the names and descriptions of the parties and the recitals, if any, follows the first witnessing part, containing a covenant for the payment of the principal debt and interest (*m*). This is succeeded by one or more further witnessing parts conveying the property by way of mortgage, subject to a proviso for redemption. Then follow any special clauses relating to the payment of the principal or interest. Next come special clauses relating to the subject-matter of the mortgage, such as restrictions on the mortgagor's power of leasing, and covenants by him for the maintenance or insurance of the mortgaged property. These may be followed by clauses modifying or extending the statutory powers of sale (*n*) and other clauses giving special remedies to the mortgagee.

Till recently, covenants for title were generally inserted at the end of mortgages, but these are now usually dispensed with in reliance upon the statutory covenants implied by the mortgagor being expressed to convey as "beneficial owner" or as "trustee," as the case may be.

Who should be parties.

ii.—**The Parties.**—All persons who are intended to convey or to take anything under the mortgage deed, or to enter into stipulations in the deed, must be made parties. These parties will usually be the mortgagor of the one part, and the mortgagee of the other part. But sometimes the concurrence of other parties will be necessary for purposes of suretyship, or of signifying consent to the mortgage, or acknowledging receipt of the mortgage moneys, or for other purposes.

Mistake in name.

Where the Christian name of one of the mortgagees was wrongly given in the parties, and the wrong name was subse-

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(*m*) See *ante*, p. 9.

(*n*) As to the powers of sale given to mortgagees by statute, see *post*, Chap. XLV.

quently erased, and the right name substituted, it was held that the alteration was not a material one so as to avoid the deed (*o*).

When recitals are advisable.

iii.—The Recitals.—Recitals are frequently unnecessary in a mortgage deed, and may accordingly be dispensed with. They are, however, sometimes necessary or convenient for the purpose of explaining the nature and incidents of the subject-matter of the security, or other matter affecting the form and contents of the deed. A recital of the mortgagor's seisin in fee, free from incumbrances, may be of use so as to render the deed, on the expiration of twenty years from its execution, a satisfactory root of title (*p*). But if earlier deeds are recited as proving the mortgagor's title, it must be borne in mind that such recitals prove only so much of the earlier deeds as are actually stated in the recital (*q*).

Estoppel by recital.

Recitals to be binding by estoppel must be clear and precise (*r*); and will bind only those who are parties to the deed and persons claiming under them, and will not affect the rights of third parties (*s*). And a fraudulent misstatement in the deed, though it will bind the mortgagor himself (*t*), may be held not to bind a party claiming through him who would be aggrieved by the fraud (*u*).

A party to a deed of conveyance is not estopped by recitals contained in other deeds through which the title to the property is derived (*x*).

Where a recital contains a misstatement which was owing to a mistake of both parties to the deed, no estoppel arises (*y*).

A recital will not be available by way of estoppel in any action or proceeding except such as are directly concerned with the deed containing the recital (*z*). Nor will estoppel be worked

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(*o*) *Re Howgate and Osborn's Contract*, (1902) 1 Ch. 451.

(*p*) *Bolton* v. *London School Board*, 7 Ch. D. 766. But see *Re Johnson and Tustin*, 30 Ch. D. 42.

(*q*) *Gillett* v. *Abbott*, 7 A. & E. 783.

(*r*) *Onward Bldg. Soc.* v. *Smithson*, (1893) 1 Ch. 1, C. A.; *Williams* v. *Pinckney*, 67 L. J. Ch. 34, C. A.

(*s*) *Stroughill* v. *Buck*, 14 Q. B. 781. See *Beckett* v. *Bradley*, 7 My. & Cr. 994; *Whitton* v. *Peacock*, 2 Bing. N. C. 411; *Gaunt* v. *Wainman*, 3 Bing. N. C. 69; *Doe* d. *Marchant* v. *Errington*, 6 Bing. N. C. 79; *Pitt* v. *Williams*, 5 A. & E. 885.

(*t*) *Doe* d. *Roberts* v. *Roberts*, 2 B. & Ald. 367.

(*u*) *Doe* d. *Williams* v. *Lloyd*, 5 Bing. N. C. 742.

(*x*) *Doe* d. *Shelton* v. *Shelton*, 3 A. & E. 265.

(*y*) *Re Carter's Trusts*, L. R. 3 Eq. 495; *Brooke* v. *Haymes*, L. R. 6 Eq. 25; *Empson's Case*, L. R. 9 Eq. 597; *Exp. Morgan, Re Simpson*, 2 Ch. D. 72.

(*z*) *Stroud* v. *Willis*, Cro. El. 362; *Carpenter* v. *Buller*, 8 M. & W. 209;

by a recital containing statements extraneous to the actual contract (*a*).

Though recitals are, as a general rule, regarded as binding on all parties to the deed, they may be construed as amounting to an admission by one party only, so as to estop him, but not the other party (*b*).

Inaccurate recitals.

Inaccuracies in the recitals will not vitiate the deed (*c*), but they may influence the construction (*d*). A recital though inaccurate may bind the mortgagor and those subsequently claiming under him by way of estoppel. So, if a mortgage deed contains a positive statement of a matter of title, or of any other matter material to the transaction, such statement will bind the estate in the hands of the mortgagor or persons claiming through him (*e*). But, in order to have this effect, the statement must be positive and distinct (*f*). So a statement that the grantor is well entitled in fee, at law or in equity (*g*), or that the mortgagor is seised or otherwise well entitled (*h*), is not sufficient to bind the subsequently-acquired legal estate in the hands of the mortgagor or a puisne mortgagee, or a purchaser of the equity of redemption.

How far recitals control operative part of the deed.

Although clear words of conveyance cannot be controlled by words of recital, it has been held that the estate clause and general words are not to be regarded as clear words of conveyance which cannot be so controlled (*i*). It is conceived that the same rule must be deemed to apply to all matters imported as incident to a conveyance of land by virtue of the Conveyancing Act, 1881, ss. 6 and 63 (*k*).

Hill v. *Manchester, &c. Waterworks Co.*, 2 B. & Ad. 344; *Carter* v. *Carter*, 3 K. & J. 617.

(*a*) *Kipp* v. *Wiggett*, 10 C. B. 354; *Gillett* v. *Abbott*, 7 A. & E. 783.

(*b*) *Doe* d. *Rogers* v. *Brooks*, 3 A. & E. 513.

(*c*) *Moody* v. *Lewin*, Cro. El. 127; *S. C. sub nom. Lewen and Moody's Case*, 3 Leon. 135; *Withes* v. *Casson*, Hob. 128.

(*d*) *Mosley* v. *Motteux*, 10 M. & W. 533.

(*e*) *Goodtitle* v. *Bailey*, Cowp. 601; *Taylor* v. *Needham*, 2 Taunt. 278; *Doe* v. *Stone*, 3 C. B. 176; *Carpenter* v. *Bullen*, 8 M. & W. 212; *Gwin* v. *Neath Canal Co.*, L. R. 3 Ex. 209. See further as to estoppels by deed, notes to *Duchess of Kingston's Case*, in 2 Sm. L. C. 11th ed. 731; Norton on Deeds, pp. 194 *et seq.*

(*f*) *Palmer* v. *Ekins*, 2 Ld. Raym. 1550, 1553.

(*g*) *Right* d. *Jeffreys* v. *Bucknell*, 2 B. & Ad. 278; *General Finance, &c. Co.* v. *Liberator Permanent Benefit Building Society*, 10 Ch. D. 15; *Onward Building Society* v. *Smithson*, (1893) 1 Ch. 1, C. A.

(*h*) *Heath* v. *Crealock*, L. R. 10 Ch. 22.

(*i*) *Rooke* v. *Lord Kensington*, 2 K. & J. 753; *Francis* v. *Minton*, L. R. 2 C. P. 543; *Neame* v. *Moorsom*, L. R. 3 Eq. 91, at p. 97; *Howard* v. *Lord Shrewsbury*, L. R. 17 Eq. 391. But see *Young* v. *Wallingford*, 52 L. J. Ch. 590.

(*k*) See *post*, p. 125.

Equivocal operative words may be explained by recitals.

On the other hand, if there is any doubt about the construction of the governing words of a document, the recitals may be looked at in order to determine what is the true construction (*l*); but in considering the effect of recitals in controlling the operative part of a deed, the rule appears to be that the whole deed must be regarded, and the intention of the parties must be gathered from it, and that the recitals or the words of the operative part will take effect according as the one or the other exhibits a more clear indication of the intention (*m*).

Where recitals specified as the subject-matter of the deed certain estates which were comprised in two recited instruments, but the words in the operative part were sufficiently wide to embrace another estate not included in either of those instruments, it was held that this last-mentioned estate did not pass (*n*).

Care should be taken in framing the recitals to avoid any repugnancy or inconsistency between them and the operative parts of the deed.

Clear operative words not controlled.

It is a general and well-settled rule that a recital does not control the operative part of a deed where the operative part is clear (*o*).

Where the recitals in a mortgage deed to secure a partnership debt referred only to certain joint property of the partners, but by the operative part of the deed conveyed that property and "all other hereditaments of them or either of them situate elsewhere in the town of M.," it was held that certain separate

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(*l*) Per Brett, L.J., in *Leggott* v. *Barrett*, 15 Ch. D. 306, at p. 311, C. A.

(*m*) See *Barrett* v. *Wyatt*, 30 Beav. 443. See also *Bailey* v. *Lloyd*, 5 Russ. 344; *Re Michell's Trusts*, 9 Ch. D. 9, C. A.

(*n*) *Jenner* v. *Jenner*, L. R. 1 Eq. 361; and compare *Young* v. *Wallingford*, 52 L. J. Ch. 590; and *Alexander* v. *Crosbie*, Ll. & G. t. Sugd. 145.

In addition to the cases above referred to, the following cases may be referred to as affording examples of words of conveyance controlled by recitals: *Ringer* v. *Cann*, 3 M. & W. 343; *Solly* v. *Forbes*, 2 Br. & B. 38; *Lindo* v. *Lindo*, 1 Beav. 496; *Doe* d. *Meyrick* v. *Meyrick*, 2 Cr. & J. 223; *Cholmondeley* v. *Clinton*, 2 J. & W. 1; *Walsh* v. *Trevanion*, 15 Q. B. 733; *Hunt* v. *White*, 27 L. J. Ch. 326. *Denison* v. *Holiday*, 28 L. J. Ex. 25; *Hopkinson* v. *Lusk*, 12 W. R. 392; *Gray* v. *Earl of Limerick*, 2 De G. & Sm. 370; *Childers* v. *Eardley*, 28 Beav. 648; *Danby* v. *Coutts & Co.*, 29 Ch. D. 500; *Re De Ros, Hardwick* v. *Wilmot*, 31 Ch. D. 81; *Ex p. Dawes*, 17 Q. B. D. 275.

Cases of operative words restricted by recital.

Instances in which the operative part being sufficiently clear the recital has not been allowed to have the effect of controlling, may be found in the following authorities: *Ingelby* v. *Smith*, 10 Bing. 84; *Bird* v. *Lake*, 1 H. & M. 111; *Willoughby* v. *Middleton*, 2 J. & H. 344; *Ramsden* v. *Smith*, 2 Drew. 298; *Hammond* v. *Hammond*, 19 Beav. 29; *Campbell* v. *Bainbridge*, 14 Beav. 222; *Young* v. *Smith*, L. R. 1 Eq. 180; *Dawes* v. *Tredwell*, 18 Ch. D. 354.

(*o*) Per Jessel, M.R., in *Dawes* v. *Tredwell*, 18 Ch. D. 358, C. A.

estate of one of the partners situate in that town was included in the mortgage (*p*).

Similarly, recitals will not control the exercise of rights or powers expressly conferred as incident to the conveyance of the mortgage property. So, where a transfer of a mortgage recited that the mortgage contained a power of sale, and that such power was not intended to be exercised, but by the first operative part of the deed the mortgage debt was assigned, together with all powers and remedies, &c., it was held that the power of sale in the mortgage was exerciseable, notwithstanding the recital (*q*).

Covenants for payment of principal and interest.

iv.—The first Testatum—Receipt Clauses, Covenants for Payment of Principal and Interest.—After the recitals, if any, follows the first witnessing part, which, according to the usual practice, is to the following effect, viz.:—That in consideration of the sum advanced by the mortgagee or mortgagees, the receipt of which is acknowledged, the mortgagor covenants with him or them for payment of the principal on a fixed day (usually six months after the date of the mortgage), with interest in the meantime; and further, that if the mortgage moneys shall not be paid on that day, the mortgagee will pay interest at the same rate on the principal moneys for the time being unpaid until payment thereof.

Advance by trustees.

Where trust money is lent on mortgage it is the usual practice that the mortgage deed should not disclose the existence of the trust, but should merely state that the advance is made out of moneys belonging to the trustees (naming them) on a joint account (*r*).

Effect of receipt clause.

Formerly, it was usual that the receipt by the mortgagor of the money should be acknowledged by a clause in the operative part of the deed, and also by a memorandum of receipt indorsed on the receipt and signed by the mortgagor. The absence of such a memorandum has been held to raise suspicion, so as to put a purchaser on inquiry as to whether any and what money had actually passed (*s*). And a transferee of a mortgage who had no notice that the mortgagor had not received the full amount of the advance was held to be entitled to rely on the

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(*p*) *Exp. Young*, 4 Deac. 185. See also *Exp. Glyn*, 1 M. D. & De G. 29.

(*q*) *Boyd* v. *Petrie*, L. R. 7 Ch. 385.

(*r*) See as to this, *post*, Chap. XXIX., Sect. IX.

(*s*) *Kennedy* v. *Green*, 3 My. & K. 699. See also *Greenslade* v. *Dare*, 30 Beav. 284.

acknowledgment in the body of the deed, and on the receipt indorsed thereon, which were for the full amount, and that the accounts must be taken on the footing that such amount had actually been advanced (*t*).

A solicitor taking a security from his own client cannot rely on any statement in the instrument as to the amount advanced, but must prove it by independent evidence. But as against a transferee without notice that the full amount had not been advanced, the account must be taken on the footing of its having been advanced (*u*).

Receipt not conclusive in equity.

Neither a receipt clause in the body of a deed, nor an indorsed memorandum of receipt, was, however, conclusive in equity so as to exclude evidence that the money was in fact not received (*x*). So also it may be shown that part of the money was returned (*y*).

With regard to deeds executed after the 31st December, 1881, the Conveyancing Act, 1881, enacts as follows:—

Receipt in deed sufficient.

54.—"(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this Act."

Receipt in deed or indorsed evidence for subsequent purchaser.

55.—"(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

(2.) This section applies only to deeds executed after the commencement of the Act."

Receipt in deed or indorsed authority for payment to solicitor.

56.—"(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be a sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any sepa-

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(*t*) *Bickerton* v. *Walker*, 31 Ch. D. 151. See also *Gordon* v. *James*, 30 Ch. D. 249; *Rimmer* v. *Webster*, (1902) 2 Ch. 163.

(*u*) *Bateman* v. *Hunt*, (1904) 2 K. B. 530. See *Powell* v. *Browne*, (1907) W. N. 228.

(*x*) *Coppin* v. *Coppin*, 2 P. Wms. 291; *Winter* v. *Lord Anson*, 3 Russ. 488.

(*y*) *Baker* v. *Dewey*, 1 B. & C. 704.

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rate or other direction or authority in that behalf from the person who executed or signed the deed or receipt (*z*).

This section applies only in cases where consideration is to be paid or given after the commencement of this Act."

The effect of the statutory receipt clause is to estop a mortgagor or transferor from denying payment, but it does not apparently prevent him from showing that the payment was made out of the moneys of a third party (*a*).

Receipt by trustee.

By the Trustee Act, 1893 (*b*), the receipt in writing of trustees for moneys payable to them under any trust or power is sufficient discharge for the same, and exonerates the person so paying from seeing to the application thereof (*b*).

Receipt where money is advanced to tenant for life under S. L. Acts.

Where a tenant for life borrows money for enfranchisement, or for equality of exchange or partition under the Settled Land Act, 1882 (*c*), or for the purpose of discharging an incumbrance on the settled land under the Settled Land Act, 1890 (*d*), the money raised is capital money arising under the Acts; and, accordingly, the money, unless paid into Court, should be paid to the trustees of the settlement, whose receipt in writing will be a sufficient discharge to the mortgagee so paying the money (*e*).

Power of trustees to authorize receipt of money by solicitor.

By the Trustee Act, 1893 (*f*), a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money receivable by the trustee under the trust, by permitting the solicitor to have the custody of and produce a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing Act, 1881 (*g*), and a trustee shall not be chargeable for breach of trust by reason only of his having made, or concurred in making, such appointment; and the producing of any such deed by the solicitor is to have the same validity under

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(*z*) The solicitor who produces the deed must be acting for the person who has signed the receipt, and be specially authorized to receive the money, and he must actually produce the deed: *Day* v. *Woolwich Equitable Building Society*, 40 Ch. D. 491; *Re Hetling and Merton's Contract*, (1893) 3 Ch. 269, C. A.; and see *King* v. *Smith*, (1900) 2 Ch. 425, where a mortgagor was estopped from denying the authority of the solicitor to produce the deed.

(*a*) *Rimmer* v. *Webster*, (1902) 2 Ch. 163; cf. *Jared* v. *Clements*, (1903) 1 Ch. 428.

(*b*) 56 & 57 Vict. c. 53, s. 20, re-enacting the similar provision in the repealed 44 & 45 Vict. c. 41, s. 36.

(*c*) *Ibid.* s. 18.

(*d*) 53 & 54 Vict. c. 69, s. 11; *Hampden* v. *Buckinghamshire*, (1893) 2 Ch. 531.

(*e*) 45 & 46 Vict. c. 38, s. 40.

(*f*) 56 & 57 Vict. c. 53, s. 17, re-enacting the similar provision contained in the repealed Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 2. See *Re Hetling and Merton's Contract*, (1893) 3 Ch. 269, C. A.

(*g*) *Supra.*

the said section as if the person appointing a solicitor had not been a trustee. This section applies only where the money is received after the 24th of December, 1888.

But a trustee will be liable if he permits mortgage money which has been paid off to remain in the hands of his solicitor or banker for a longer period than is reasonably necessary (*h*), though to bring the section into operation the circumstances must be such that the trustee knew, or ought to have known, of the receipt of the money (*i*).

Covenants for payment of principal and interest.

It has been seen that the covenant for payment of principal and interest on the day fixed is of the nature of a collateral security, and not an essential part of the mortgage security (*k*). Such covenants are, indeed, sometimes omitted; but if it is intended that the mortgagor should not be personally liable for payment of the mortgage moneys, a proviso expressly excluding such liability should be inserted in the deed.

Where a covenant stipulates for payment of principal and interest on a fixed day, they are distinct debts, and may be sued for separately. Where the recitals in a mortgage contained an agreement for interest, but there was no provision as to payment of interest in the other parts of the deed, interest was nevertheless recoverable (*l*).

It is usual and prudent to have a distinct and separate covenant for payment of interest, if the principal is not paid on the day appointed, so as to prevent any doubt as to the power of the mortgagee to sue for the interest apart from the principal; though it would appear that such separate covenant is not absolutely necessary for this purpose (*m*). The operation of these covenants, and the remedies of mortgagees thereunder, will be considered in a later part of this treatise (*n*).

Form of conveyance in mortgage deeds.

v.—The Second Testatum—The Conveyance.—Next after the covenants for payment of principal and interest will come a further witnessing part, whereby the property intended to be mortgaged is conveyed to the mortgagee subject to a proviso for redemption. If several kinds of property are included in the same mortgage deed, as freeholds, copyholds, and leaseholds, or

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(*h*) Sect. 17 (3).

(*i*) *Re Sheppard*, (1911) 1 Ch. 50.

(*k*) See *ante*, p. 9.

(*l*) *Dickenson* v. *Harrison*, 4 Pri. 282.

(*m*) *Ibid.*; *Attwood* v. *Taylor*, 1 Man. & G. 279, 307.

(*n*) *Post*, Chap. XLVII.

a life interest in real or personal estate, and a policy of assurance on the life of the mortgagor, it will be generally advisable to convey each kind of property by a separate witnessing part, employing in each case the appropriate word of conveyance, such as "grant," "covenant to surrender," or "assign," according as the property is freehold, copyhold, or personalty (including leaseholds); the use of such technical words, however, is not essential, and, by the Conveyancing Act, 1881 (*o*), the word "convey" will effect a valid and sufficient assurance by way of mortgage of any property.

It is necessary, however, in order to pass the legal estate to use the word "heirs" or the words "in fee simple." Where, therefore, land was reconveyed to the mortgagor "in fee" free from the mortgage, the legal estate in the fee simple did not pass (*p*).

Conveyance "as beneficial owner," &c.

The mortgagor, if beneficially entitled to the property, should be made to convey "as beneficial owner," so as to import the full statutory covenants for title; or, if he is a trustee raising money for portions or other purposes of his trust, he should be made to convey "as trustee," so as to import the statutory covenant that he has not incumbered (*q*).

Description of mortgaged property.

vi.—The Parcels.—Immediately after the operative words and the mention of the grantee, follows the description of the property intended to be conveyed; this description is technically called "the parcels."

The parcels should be fully and particularly described either in the witnessing part of the deed, or by reference to a description given in a schedule in order to identify the property; the situation, boundaries, occupation, dimensions, and distinctive name, if any, should be fully and accurately set forth. In respect to all these matters, it is important to avoid mistakes (*r*).

Care should also be taken to define clearly the nature and extent of the estate or interest intended to be conveyed. Where a tenant for life of an entire estate and a remainderman, who was supposed to be entitled to a moiety subject to the life

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(*o*) 44 & 45 Vict. c. 41, s. 2 (v).

(*p*) *Re Ethell and Mitchell*, (1901) 1 Ch. 945. See *Ottley's Estate*, (1910) 1 Ir. R. 1.

(*q*) *Ibid.* s. 7. See *post*, p. 150.

(*r*) *Lambe* v. *Reaston*, 5 Taunt. 207; *Wrottesley* v. *Adams*, Plow. 191. See *Rorke* v. *Errington*, 7 H. L. C. 617; *Jack* v. *M'Intyre*, 12 Cl. & F. 151; *Francis* v. *Hayward*, 22 Ch. D. 181.

interest, joined in mortgaging the undivided moiety of the estate, and, in fact, the share of the remainderman was only a fifth, it was held that only one-fifth of the interest of the tenant for life passed, though the mortgage was intended to secure a debt due from both the mortgagors (*s*).

The mode of describing the parcels according to the nature of the property and the legal significance of the terms used in describing property, will be found discussed in other works (*t*).

"Parcel or no parcel."

The question of "parcel or no parcel" is for the jury, but the judge is bound to explain to the jury, for their guidance, what is the true construction of any documents necessary for the decision of this question (*u*).

What passes by a mortgage of land.

A mortgage of land, unless the contrary appears, will comprehend not only the ground or soil, but also water covering its surface, mines and minerals thereunder, timber and trees growing thereon, and houses and buildings standing or subsequently erected upon it (*x*). If mines and minerals are not intended to be included in a mortgage because the mortgagor is not the owner thereof, or for any other reason, they should be expressly excepted from the conveyance. A mine or quarry opened by the mortgagor subsequently to the mortgage will enure for the benefit of the mortgagee (*y*).

Trade or business conducted on mortgaged premises.

Where lands or buildings used for the purpose of a trade or business are conveyed, by way of mortgage, without any express mention of the trade or business in the description of the parcels, the question whether such trade or business is included in the security will depend on whether its nature is such that a grant of the right to carry it on is necessarily involved in a conveyance of the land or buildings, so that the parties to the conveyance must have intended the right to pass.

Mines.

So a mortgage of land, mines, beds and seams of coal, and other the premises comprised in a lease referred to, but making no mention of the business or goodwill of the colliery, was held to include the colliery business, and the right to work the mines (*z*).

(*s*) *Grieveson* v. *Kirsopp*, 5 Beav. 283.

(*t*) Dart, Vendors & Purchasers, 7th ed. Vol. I. pp. 554 *et seq.*; Dav. Conv. Vol. I. pt. i. pp. 82 *et seq.*

(*u*) *Turner* v. *Dickenson*, 3 Cl. & F. 594; *Lyle* v. *Richards*, L. R. 1 H. L. 222.

(*x*) Co. Lit. 4 a; *Ewer* v. *Haydon*, Cro. Eliz. 476; *Luttrel's Case*, 4 Rep. 87 b; *Canham* v. *Fisk*, 2 Cr. & J. 126.

(*y*) *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Ca. 454.

(*z*) *County of Gloucester Bank* v. *Rudry, Merthyr, &c. Colliery Co.*, (1895) 1 Ch. 629, C. A.

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Hotel.

On the other hand, where an hotel keeper, in 1888, having an agreement for a lease of land on which he was about to build, mortgaged "the said building agreement, and all the premises comprised therein, and the hotel and buildings to be hereafter erected as aforesaid, and the lease so to be granted as aforesaid," it was held that the security did not comprise the business (*a*).

Goodwill.

Upon a mortgage of a business, the goodwill is included in the security (*b*); but it would seem that if the business were to be sold under an order of the Court, or under the mortgagee's power of sale, the mortgagor would not be prevented from setting up a similar business under his own name (*c*).

The goodwill, however, of trade premises does not pass to a mortgagee when it depends on the personal skill of the owner (*d*). Nor does the mortgage of a lease of business premises pass the goodwill unless it is expressly mentioned (*e*). But a mortgage by a hotel company of all its property and effects will include the goodwill (*f*).

Public-house licence.

The mortgage of a public-house and the goodwill carries with it the right to the licence (*g*). But the mortgagee is not entitled to the produce of the sale of a new spirit licence obtained by the mortgagor after the former licence which was included in the mortgage has been forfeited; especially if the mortgagee has previously sold the premises under the power of sale in the deed (*h*).

General words.

vii.—General Words.—After the description of the parcels it was the invariable practice to add a clause, commonly called the "general words," by which the grantor purported to include in his grant all those parts of the property which were not usually described with minute accuracy in the parcels, and which belonged to him at the date of the grant, as appurtenant to the property granted.

(*a*) *Whitley* v. *Challis*, (1892) 1 Ch. 64, C. A.

(*b*) *Chissum* v. *Dewes*, 5 Russ. 29; *King* v. *Midland R. Co.*, 17 W. R. 113; *Exp. Lambton*, 3 Ch. D. 36, C. A.; *Exp. Punnett*, 16 Ch. D. 226, C. A.

(*c*) *Walker* v. *Mottram*, 19 Ch. D. 355, C. A. See *Trego* v. *Hunt*, (1896) A. C. 7; *Re David and Matthews*, (1899) 1 Ch. 378.

(*d*) *Cooper* v. *Metropolitan Board of Works*, 25 Ch. D. 472, C. A.

(*e*) *Baglioni* v. *Cavalli*, 49 W. R. 236, where there were successive mortgages.

(*f*) *Re Leas Hotel Co.*, (1902) 1 Ch. 332.

(*g*) *Rutter* v. *Daniel*, 30 W. R. 801, C. A.; *Garrett* v. *JJ. of Middlesex*, 12 Q. B. D. 620.

(*h*) *Manifold* v. *Morris*, 5 Bing. N. C. 420; *Exp. Reid*, 1 D. & C. 250.

Effect of general words.

General words have in many cases been held to pass what without them might not pass by the deed, that is to say, the clause has been held to operate to grant more than the law would otherwise give (*i*).

General words will pass only that which the grantor had to give at the date of the grant, and will not extend to anything he may subsequently acquire (*k*). In other words, this clause will work no estoppel.

Conveyancing Act, 1881, s. 6.

The practice of inserting general words in purchase deeds and mortgages is now generally rendered unnecessary by the 6th section of the Conveyancing Act, 1881 (*l*).

The section, however, does not apply to or alter contracts, but only says what, in the absence of a contrary intention, is to be included in the conveyance. It does not give the mortgagee anything more than he would have got before the Act (*m*).

The word "enjoyed" in s. 6 (2) means enjoyed in such a way as to give rise to the expectation that the enjoyment will be continued (*n*). But it may include rights, the enjoyment of which has been permissive and precarious only (*o*).

Estate clause.

By sect. 63 of the same Act, a conveyance made after the commencement of the Act passes all the estate, &c. of the conveying party in the property conveyed, where a contrary intention is not expressed. The insertion of an "estate clause" in a mortgage is thus rendered superfluous and unnecessary. Accordingly, where a grantor purports to convey in fee by way of mortgage, but has only in equity a leasehold interest in the property, such interest passes to the grantee (*p*).

Generally all fixtures attached to soil pass to mortgagee.

viii.—What Fixtures, &c. pass to the Mortgagee.—Fixtures annexed to the freehold will pass to the mortgagee without being named, unless excluded expressly, or by inference (*q*), and whether placed there before or after the mortgage (*r*); and in

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(*i*) *Bailey* v. *Great Western Rail. Co.*, 26 Ch. D. at p. 444.

(*k*) *Booth* v. *Alcock*, L. R. 8 Ch. 663. See *Beddington* v. *Atlee*, 35 Ch. D. 317; and (1903) 2 Ch. at p. 172.

(*l*) 44 & 45 Vict. c. 41.

(*m*) *Re Peck and School Board for London*, (1893) 2 Ch. 315; *Re Hughes and Ashley*, (1900) 2 Ch. 595.

(*n*) *Godwin* v. *Schweppes*, (1902) 1 Ch. 926.

(*o*) *International Tea Co.* v. *Hobbs*, (1903) 2 Ch. 165; *Key* v. *Neath D. C.*, 93 L. T. 507.

(*p*) *Thellusson* v. *Liddard*, (1900) 2 Ch. 635; cf. *Williams* v. *Pinckney*, 67 L. J. Ch. 34.

(*q*) *Hare* v. *Horton*, 5 B. & Ad. 715; *Longstaff* v. *Meagoe*, 2 A. & E. 167; *Hitchman* v. *Walton*, 4 M. & W. 416; *Waterfall* v. *Penistone*, 6 E. & B. 876; *Mather* v. *Fraser*, 2 K. & J. 536; *Holland* v. *Hodgson*, L. R. 7 C. P. 328.

(*r*) (1897) 1 Ch. p. 189; *Monti* v.

some cases chattels have been held so to pass, although fixed slightly, and for mere convenience (*s*), and although not fixed at all, except by their own weight (*t*).

There is no difference in this respect between a mortgage in fee and a mortgage of leaseholds (*u*), or whether the security be a memorandum of deposit of title deeds of freeholds (*x*), or other equitable mortgage (*y*), or a deposit of a lease (*z*), and whether the fixtures are trade fixtures or not (*a*); or tenant's fixtures (*b*); and the mortgage was held to attach to the produce of the fixtures after the lease had expired (*c*).

But in the case of an equitable mortgage, a prior equitable interest in the fixtures will prevail over a subsequent equitable charge (*d*).

Sale of fixtures under power.

Under a power in a mortgage to sell the land, either together or in parcels, fixtures cannot be sold separately (*e*); and the same rule would apply to a sale by a mortgagee under the statutory power (*f*). If a special power is inserted in a mortgage for the mortgagee to remove and sell the fixtures apart from the land, the instrument must be registered as a bill of sale (*g*).

Tenant's fixtures.

In the case of a mortgage of leaseholds the tenant's fixtures, which as against the freehold reversioner the lessee would be entitled to remove, will pass to the mortgagee (*h*). When the

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Barnes, (1901) 1 K. B. 205; cf. *Gough* v. *Wood*, (1894) 1 Q. B. 713, C. A.

(*s*) *Ibid.*; and *Exp. Barclay*, 5 De G. M. & G. 413.

(*t*) *Monti* v. *Barnes*, (1901) 1 K B. 205, C. A.

(*u*) *Meux* v. *Jacobs*, L. R. 7 H. L. 481; *Mather* v. *Fraser*, 2 K. & J. 536; *Longstaff* v. *Meagoe*, 2 A. & E. 167; *Reynolds* v. *Ashby*, (1904) A. C. 466.

(*x*) *Exp. Price*, 2 M. D. & De G. 518; *Exp. Tagart*, De G. 531; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123; *Exp. Heathcoat*, Fonb. Bky. 208.

(*y*) *Exp. Edwards*, Fonb. Bky. 42; *Exp. Heathcoat*, Fonb. Bky. 208; *Tebb* v. *Hodge*, L. R. 5 C. P. 73; *Exp. Cowell*, 17 L. J. Bky. 16; *Williams* v. *Evans*, 23 Beav. 239.

(*z*) *Meux* v. *Jacobs*, L. R. 7 H. L. 481; *Exp. Broadwood*, 1 M. D. & De G. 631; *Exp. King*, 1 M. D. & De G. 119; *Williams* v. *Evans*, *sup.* See *Exp. Lusty*, 60 L. T. 160.

(*a*) *Longbottom* v. *Berry*, L. R. 5 Q. B. 123; *Exp. Barclay*, 5 De G. M. & G. 413; *Mather* v. *Fraser*, 2 K. & J. 536; *Walmsley* v. *Milne*, 7 C. B. N. S. 115; *Re Head*, 12 W. R. 215; *Re Calvert*, (1898) 2 Ir. R. 501. But see *infra*.

(*b*) *Exp. Loyd*, 3 D. & C. 765; *Exp. Bentley*, 2 M. D. & De G. 591; *Exp. Broadwood*, *sup.*; *Exp. King*, 1 M. D. & De G. 119; *Exp. Tagart*, De G. 531; *Williams* v. *Evans*, *sup.*; *Fearenside* v. *Derham*, 13 L. J. Ch. 354; *London Discount Co.* v. *Drake*, 6 C. B. N. S. 798.

(*c*) *Fearenside* v. *Derham*, *sup.*

(*d*) *Re Samuel Allen & Sons*, (1907) 1 Ch. 575.

(*e*) *Exp. Barclay*, L. R. 9 Ch. 576, explained *Exp. Brown*, 9 Ch. D. 390, C. A.

(*f*) 44 & 45 Vict. c. 41, s. 19.

(*g*) *Johns* v. *Ware*, (1899) 1 Ch. 359; and see *post*, p. 216.

(*h*) *Exp. Barclay*, 5 De G. M. & G. 413; *Meux* v. *Jacobs*, L. R. 7 H. L. 481; *Southport and West Lancs. Banking Co.* v. *Thompson*, 37 Ch. D. 64, C. A.; *Reynolds* v. *Ashby*, (1904) A. C. 466.

mortgage is by way of sub-demise, the mortgagee has no right to remove such fixtures, unless an intention to that effect appears by the deed, nor can the mortgagor remove them during the mortgage term, but he still retains the right to remove them which he may exercise so soon as the mortgage is satisfied (*i*).

Where a tenant surrenders his lease to his landlord, a mortgagee from the tenant has a right to remove fixtures within a reasonable time after the surrender; and debenture holders have a similar right where a company forfeits a lease by a voluntary winding up (*k*).

Fixtures attached after mortgage.

As a general rule, fixtures attached to the premises subsequently to the mortgage are included in the mortgage, whether it be in fee (*l*), or of leaseholds (*m*); and whether by deed or mere deposit of title deeds (*m*), or in an equitable mortgage (*n*); and whether of freeholds (*l*) or leaseholds (*o*); and whether tenant's fixtures or not (*p*); and where the fixtures are put up by the mortgagor and his partner (*q*); and although the mortgagor is tenant to the mortgagee under an attornment clause (*r*).

Definition of "fixtures."

The word "fixtures," though used by some legal writers to express different meanings, may be here defined as meaning chattels which were originally moveable, but which having been annexed to the soil have ceased to be removeable therefrom, and have become part of the freehold; by the expression "annexed" is meant that a thing, which otherwise would be moveable, is either actually fixed in or fastened to the ground or is essentially part of or connected with something which is so fixed or fastened. The question as to what chattels are fixtures and what are removeable is not always easy to determine, and has been the subject of numerous reported decisions.

The question is one of intention, and the true test seems to be whether the annexation was for the purpose of improving the

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(*i*) *Southport and West Lancs. Banking Co.* v. *Thompson*, *sup.*

(*k*) *Re Glasdir Copper Mines*, (1904) 1 Ch. 819.

(*l*) *Cullwick* v. *Swindell*, L. R. 3 Eq. 249; *Climie* v. *Wood*, L. R. 3 Ex. 257; L. R. 4 Ex. 328; *Meux* v. *Jacobs*, L. R. 7 H. L. 481; *Walmsley* v. *Milne*, 7 C. B. N. S. 115; *Monti* v. *Barnes*, (1901) 1 K. B. 205, C. A.

(*m*) *Meux* v. *Jacobs*, *sup.*; *Elliott* v. *Bishop*, 10 Exch. 49; *Reynolds* v. *Ashby*, (1903) 1 K. B. 87, C. A.

(*n*) *Exp. Cotton*, 2 M. D. & De G. 725; *Exp. Reynal*, 2 M. D. & De G. 443; *Exp. Price*, 2 M. D. & De G. 518.

(*o*) *Meux* v. *Jacobs*, *sup.*

(*p*) *Exp. Reynal*, *sup.*; *McCluney* v. *Lemon*, Hayes, 154; *Ackroyd* v. *Mitchell*, 3 L. T. N. S. 236. But see *post*, p. 133.

(*q*) *Exp. Cotton*, 2 M. D. & De. G. 725; *Exp. Scarth*, 1 M. D. & De G. 240; *Cullwick* v. *Swindell*, L. R. 3 Eq. 249.

(*r*) *Exp. Punnett*, 16 Ch. D. 226, C. A.

freehold, or only for the better enjoyment of the chattel itself, and this intention must be gathered from the facts of each particular case, having regard to the degree of the annexation and the purpose of the annexation (*s*). The degree of annexation may be material as evidence of intention, but it is not conclusive, and may be immaterial. The purpose of the annexation is to be inferred from the circumstances of each case (*t*). The question is one not of the nature of the attachment, but of its purpose and of the intention with which it was made (*u*). A chattel may be a fixture, though it is not physically attached to the freehold in any way except by its own weight (*x*). And on the other hand, a chattel is not necessarily a fixture, even though it is fixed as firmly as it would have been if it had been intended to annex it permanently to the freehold (*y*).

What chattels are included in the term.

Generally speaking, subject to exceptions hereafter to be noticed (*z*), it may be laid down that anything is a fixture which is itself imbedded in the soil, or is so attached thereto or to any building or permanent erection thereon by cement, nails or other fastening, as not to be removeable without injury to the freehold (*a*).

So it has been said that, in the absence of contrary intention, expressed or to be implied, whatever is substantially part of a house, so that it could not be taken away without depriving the house of what was intended to be used with the building, should be considered as fixtures (*b*).

The following chattels, when embedded in, or attached to, the soil, or essentially forming part of, or connected with, chattels so imbedded or attached, have been held to be fixtures:—Steam engines and hammers (*c*), boilers (*d*), furnaces and cutters (*e*),

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(*s*) *Re De Falbe*, (1901) 1 Ch. 523, affirmed *sub nom. Leigh* v. *Taylor*, (1902) A. C. 157.

(*t*) *Ibid.*, per Vaughan Williams, L.J.

(*u*) *Re Hulse*, (1905) 1 Ch. 406.

(*x*) *Monti* v. *Barnes*, (1901) 1 K. B. 205, C. A.

(*y*) *Re De Falbe*, *sup.*, per Rigby, L.J.

(*z*) See *infra*, p. 130. As to what articles are fixtures and what are removeable, and the extent and qualifications of the right to removal generally, see Woodfall, 18th ed. 711.

(*a*) *Exp. Moore and Robinson's Banking Co.*, *Re Armytage*, 14 Ch. D. 379, at p. 386; *Re De Falbe*, (1901) 1 Ch. 523. And see *Rufford* v. *Bishop*, 5 Russ. 346.

(*b*) Per Pearson, J., in *Smith* v. *Maclure*, 32 W. R. 459; *Monti* v. *Barnes*, (1901) 1 K. B. 205.

(*c*) *Metropolitan Counties Soc.* v. *Brown*, 26 Beav. 454; *Walmsley* v. *Milne*, 7 C. B. N. S. 115; *Exp. Astbury*, L. R. 4 Ch. 630; *Coombs* v. *Beaumont*, 5 B. & Ad. 72; *Thompson* v. *Pettitt*, 10 Q. B. 101.

(*d*) *Ibid.*; *Hubbard* v. *Bagshaw*, 4 Sim. 326.

(*e*) *Metropolitan Counties Soc.* v. *Brown*, *sup.*; *Tottenham* v. *Swansea* coke oven, still, malt-mill, sleepers and rails of railways (*f*), tramway and steam crane (*g*), looms fixed by nails to plugs sunk into the floor (*h*), silk spinning machines resting by their own weight only on the ground, but attached by moveable bolts to iron rods fixed to mill-beams overhead (*i*), lace looms attached in a similar manner (*k*), retorts, purifiers, and boilers in gas-works (*l*), engines and machinery, attached to a building by bolts and screws and removeable without injury (*m*), piles before a wharf in the river Thames (*n*), a wind-mill (*o*), cornices and poles, and pier glasses in frames (*p*). Moveable parts of fixed machinery are fixtures, *e.g.*, locks and keys of a house, millstones (*q*), anvil used with fixed steam hammer (*r*), driving-belts for working machinery (*s*), and gear necessary for working fixed looms (*t*).

What chattels are not included.

The following are moveables :—

Carpets attached with nails (*u*) ; looms (*x*), and weighing machines (*y*) deposited in holes or sockets ; iron plates (*z*) ; hydraulic press not necessary for factory (*a*) ; mules used for spinning cotton, though fixed by screws (*b*) ; hangings and valances apart from cornices, and mantel-boards (*c*) ; chairs in theatre, screwed to floor (*d*). And articles are moveables, although partly imbedded in the soil, when they have not been so placed with the intention to annex them thereto, as plates,

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Zinc Ore Co., W. N. (1885) 69 ; 52 L. T. 738.

(*f*) *Turner* v. *Cameron*, L. R. 5 Q. B. 306.

(*g*) *Exp. Moore and Robinson's Banking Co.*, 14 Ch. D. 379.

(*h*) *Boyd* v. *Shorrock*, L. R. 5 Eq. 72 ; *Holland* v. *Hodgson*, L. R. 7 C. P. 328.

(*i*) *Haley* v. *Hammersley*, 3 De G. F. & J. 587.

(*k*) *Howie* v. *M'Lay*, 5 F. 214.

(*l*) *Reg.* v. *Inhabitants of Parish of Lee*, L. R. 1 Q. B. 241.

(*m*) *Longbottom* v. *Berry*, L. R. 5 Q. B. 123 ; *Hobson* v. *Gorringe*, (1897) 1 Ch. 182, C. A. See further, as to trade machinery, *post*, Chap. XIV., 2 (iv.).

(*n*) *Lancaster* v. *Eve*, 5 C. B. N. S. 717 ; *Martin* v. *Roe*, 7 E. & B. 248.

(*o*) *Steward* v. *Lombe*, 1 Br. & B. 506.

(*p*) *Smith* v. *Maclure*, 32 W. R. 459.

(*q*) *Place* v. *Fagg*, 4 Man. & Ry. 277 ; *Mather* v. *Fraser*, 2 K. & J. 559 ; *Fisher* v. *Dixon*, 12 Cl. & F. 312 ; *Cort* v. *Sagar*, 3 H. & N. 370 ; *Exp. Astbury*, L. R. 4 Ch. 630.

(*r*) *Metropolitan Counties Soc.* v. *Brown*, 26 Beav. 454 ; 5 Jur. N. S. 378.

(*s*) *Sheffield, &c. Building Soc.* v. *Harrison*, 15 Q. B. D. 358, C. A.

(*t*) *Cort* v. *Sagar*, 3 H. & N. 370.

(*u*) *Hellawell* v. *Eastwood*, 6 Exch. 295.

(*x*) *Hutchinson* v. *Kay*, 23 Beav. 413 ; *Boyd* v. *Shorrock*, L. R. 5 Eq. 72 ; *Holland* v. *Hodgson*, L. R. 7 C. P. 328 ; *Cort* v. *Sagar*, *sup.*

(*y*) *Exp. Astbury*, L. R. 4 Ch. 630.

(*z*) *Metropolitan Counties Soc.* v. *Brown*, *sup.* And see *Exp. Astbury*, *sup.*

(*a*) *Parsons* v. *Hind*, 14 W. R. 860.

(*b*) *Hellawell* v. *Eastwood*, *sup.* But see *Longbottom* v. *Berry*, L. R. 5 Q. B. 137, 138 ; *Crossley* v. *Lee*, (1908) 1 K. B. 86.

(*c*) *Smith* v. *Maclure*, 32 W. R. 459.

(*d*) *Lyon* v. *London City and Mid. Bank*, (1903) 2 K. B. 135.

sleepers, or rails which have accidentally penetrated the ground (*e*); so also chattels resting by their own weight only on foundations sunk into the ground (*f*).

Fixtures attached for temporary purpose.

Fixtures attached to the land, or to the building which stands upon it, by the freeholder, according to the well-known maxim, *quicquid plantatur solo, solo cedit*, accordingly pass to the heir, and not to the executor, whether the owner acquired the land or building by descent or purchase, and whether he annexed them for a permanent purpose or for the better enjoyment of the land, or whether they are trade fixtures, or the fittings up of collieries, or the like, or not (*g*). In some cases a distinction has been made where articles have been annexed to the soil for temporary convenience (*h*), or for ornament (*i*); and it seems now established, at least as between tenant for life and remainderman, that chattels fixed for the purpose of ornament and for the better enjoyment of them are not fixtures (*k*).

If the *corpus* of machinery belongs to the heir, all that belongs to such machinery, whether capable of being detached or not, passes to him (*l*); but tools used in connection with machinery are not fixtures (*m*).

Execution on fixtures.

Fixtures annexed to the freehold are, as a general rule, not subject to be taken as goods and chattels under an execution (*n*).

When chattels are fixed to the freehold by a tenant, they become part of it, subject to the tenant's right to separate them during the term, and thus reconvert them into goods and chattels (*o*). And although annexed, they may be treated for some purposes as chattels; for instance, in the execution of a *fi. fa.* against the tenant (*p*).

The term "fixtures" has thus acquired the peculiar but incorrect meaning of personal chattels which have been annexed to the freehold, but which are removeable at the will of the

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(*e*) *Bates* v. *Duke of Beaufort*, 8 Jur. N. S. 270.

(*f*) *Mather* v. *Fraser*, 2 K. & J. 559; *Exp. Newbery*, 10 L. T. 661; *Bates* v. *Beaufort*, *sup.*; *Hill* v. *Bullock*, (1897) 2 Ch. 482.

(*g*) *Fisher* v. *Dixon*, 12 Cl. & F. 312; *Mather* v. *Fraser*, 2 K. & J. 549.

(*h*) *Hellawell* v. *Eastwood*, 6 Exch. 295; *Elliott* v. *Bishop*, 10 Exch. 496, 508. But see *Exp. Barclay*, 5 De G. M. & G. 413.

(*i*) *Harvey* v. *Harvey*, Stra. 1141: *Squier* v. *Mayer*, Freem. Ch. 249.

(*k*) *Leigh* v. *Taylor*, (1902) A. C. 157.

(*l*) *Fisher* v. *Dixon*, 2 Cl. & F. 312; *Sheffield, &c. Building Soc.* v. *Harrison*, 15 Q. B. D. 358, C. A.

(*m*) *Haley* v. *Hammersley*, 3 D. F. & J. 522.

(*n*) *Winn* v. *Ingleby*, 5 B. & Ald. 625.

(*o*) *Lee* v. *Risdon*, 7 Taunt. 189; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123.

(*p*) *Poole's Case*, 1 Salk. 368.

person who has annexed them (*q*), and against the will of the owner of the freehold.

Distress on fixtures.

If the fixtures and machinery are slightly attached, it has been held that they are distrainable for rent (*r*); but this has not been followed (*s*), and, as a general rule, fixtures are not distrainable for rent (*t*).

Exclusion of mortgagee's right to fixtures by stipulation.

If, however, it appears, expressly or by implication from the terms of the deed or the subsequent dealings between the parties, that the mortgagee's right to fixtures is intended to be excluded or qualified, effect will be given to such intention. So it may appear, expressly or by inference, that the mortgage is not intended to pass to the mortgagee machinery annexed to the land subsequently to the mortgage (*u*). Again, where the mortgage was of an iron-foundry and two dwelling-houses with the appurtenances, "together with all grates, boilers, bells and other fixtures in and about the said two dwelling-houses," it was held that a steam-engine, machinery, and other fixtures in the foundry did not pass, though they would have passed if the fixtures in the dwelling-houses had not been specifically mentioned (*x*). But a specific enumeration of certain kinds of fixtures on the mortgage property will not necessarily raise an inference that other fixtures were not intended to pass (*y*). So a mortgage of a mill, with engines and certain specified machinery, and all other machinery "now or hereafter to be" on the lands, includes all machinery, although not *ejusdem generis* with the particulars specified (*z*).

Express mention of fixtures in deed.

If for any reason it is deemed necessary to refer to fixtures specifically, care should be taken to make the reference include all that are intended to pass. It will be advisable, therefore, in framing mortgages of property and fixtures, to specify in the deed, or in a schedule to it, the machinery intended to be comprised, so that no doubt can be raised, and especially to avoid that kind of imperfect specification which leads to the inference

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(*q*) *Hallen* v. *Runder*, 1 C. M. & R. 276.

(*r*) *Hellawell* v. *Eastwood*, 6 Exch. 295.

(*s*) *Crossley Bros.* v. *Lee*, (1908) 1 K. B. 86.

(*t*) Gilb. Distr. c. 1, s. ii. p. 42; *Darby* v. *Harris*, 1 G. & D. 234; *Dalton* v. *Whittem*, 3 Q. B. 961.

(*u*) *Waterfall* v. *Penistone*, 6 E. & B. 866; *Hobson* v. *Gorringe*, (1897) 1 Ch. 182, C. A.

(*x*) *Hare* v. *Horton*, 5 B. & Ad. 715.

(*y*) *Mather* v. *Fraser*, 2 K. & J. 559.

(*z*) *Haley* v. *Hammersley*, 3 De G. F. & J. 592; *Exp. Acton*, 4 L. T. N. S. 261. See *Wilson* v. *Whateley*, 7 Jur. N. S. 908.

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that what is not expressly included is intentionally excluded (*a*). But having regard to the Bills of Sale Acts, it appears safer to omit all express reference to fixtures (*b*). A particular enumeration of fixtures in a mortgage deed or in a schedule to it does not bring the deed within the mischief of the Bills of Sale Acts, unless there is power to sell the fixtures apart from the land (*c*). It may however be desirable in certain cases to insert a clause expressly excluding the right of severance.

Trade fixtures passed under the word "appurtenances" (*d*).

As to what will pass in a mortgage of premises "with the fixed machinery and other matters and things erected and standing thereon," see *Trappes* v. *Harter* (*e*).

Exceptions to general rule as to fixtures.

The general rule that all fixtures which are at the time of the mortgage annexed to the land, or are subsequently brought upon it, pass to the mortgagee is subject to certain qualifications or exceptions in favour of mortgagors or third persons.

Trade fixtures attached after mortgage.

Some of the decisions seem to indicate a desire to relax the rule to some extent in the case of trade fixtures brought on to the premises subsequently to the contract. Most of the cases in which the question has arisen have been decided as between landlord and tenant, but some have been decided as between the heirs and executors of deceased freeholders, and, generally, the principles of the decisions in the last-mentioned class of cases seem to apply to conflicting claims between mortgagors and mortgagees of land (*f*).

In one case, a very slight indication of intention appears to have been seized upon in order to exclude from the security trade machinery placed upon the land by the mortgagor after the date of the deed (*g*). But in a later case, in which it was held that fixtures annexed to the mortgaged freehold subsequently to the mortgage for the convenience and better enjoyment of the estate, passed to the mortgagee, it was laid down that the rules as to the right of a tenant to remove trade fixtures set up by him during the term, have no application to cases between mortgagor and mortgagee (*h*). A mortgagor cannot

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(*a*) See Dav. Conv. Vol. II. pt. i. 185, 186.

(*b*) See Key & Elph. (9th ed.) Vol. II. p. 168; *Re Brooke*, (1894) 2 Ch. 600.

(*c*) *Re Brooke*, *sup.*

(*d*) *Exp. Bentley*, 2 M. D. & De G. 591.

(*e*) 2 Cr. & M. 153.

(*f*) See *Colegrave* v. *Dios Santos*, 2 B. & Cr. 76. See also per Stirling, L.J., in *Re De Falbe*, (1901) 1 Ch. 523.

(*g*) *Waterfall* v. *Penistone*, 6 E. & B. 876.

(*h*) *Walmsley* v. *Milne*, 7 C. B. N. S. 115. See *Mather* v. *Fraser*, 2 K. & J. 536.

as between himself and his mortgagee, in the absence of special agreement, remove fixtures put up by himself, even if they are trade fixtures (*i*).

The protection accorded to trade fixtures as between landlord and tenant will, however, apply so as to prevent such fixtures placed upon the mortgaged land by a tenant of the mortgagor from passing to the mortgagee. If the fixtures are on the land at the time of the mortgage, it is clear that the mortgagor cannot pass to the mortgagee any greater right to them as against the tenant than he had himself. And where a mortgagor in possession let the mortgaged house to a tenant, who brought into it certain trade fixtures, and the mortgagee subsequently entered into possession, it was held that the fixtures did not belong to the mortgagee, but remained the property of the tenant (*k*).

Removal of fixtures.

It seems that so long as a mortgagor who is engaged in trade remains in possession, he must be deemed to be authorized by the mortgagee to enter into any contracts which are necessary or convenient for carrying on such trade in its ordinary course; and the mortgagee will be bound by such contract, though involving the right of a third person to remove chattels which would otherwise pass as fixtures to the mortgagee (*l*).

But if such implied right of removal exists, which is doubtful, it is precluded by a covenant not to remove fixtures (*m*), and in any case the entry of the mortgagee into possession will determine such authority (*n*).

Hire-purchase agreements.

So, where a mortgagor in possession puts up fixtures on the mortgaged premises under a hire-purchase agreement not under seal, on the terms that until paid for they shall remain the property of the vendor, the fixtures pass to the mortgagee, and on his taking possession they cannot be removed by the vendor. And this is so whether the mortgage is of the fee or of a long term, and whether the fixtures were erected before or after the mortgage (*o*). But where the mortgagee allowed the mortgagor to remain in possession, it was held that the mortgagee

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(*i*) *Hobson* v. *Gorringe*, (1897) 1 Ch. 182, C. A.; *Reynolds* v. *Ashby*, (1904) A. C. 466.

(*k*) *Sanders* v. *Davis*, 15 Q. B. D. 218.

(*l*) *Gough* v. *Wood*, (1894) 1 Q. B. 713, C. A.

(*m*) *Ellis* v. *Glover*, (1908) 1 K. B. 388.

(*n*) *Hobson* v. *Gorringe*, *sup.*

(*o*) *Hobson* v. *Gorringe*, (1897) 1 Ch. 182, C. A.; *Reynolds* v. *Ashby*, (1903) 1 K. B. 87, C. A.

must be taken to have acquiesced in his making agreements for fixing and removing fixtures for the purposes of his trade, and that he could not claim the fittings as against the vendors who had removed them on default in payment of an instalment of the purchase-money (*p*).

The case of *Gough* v. *Wood* depended however on special circumstances, and has never been cited except to be distinguished (*q*). Further, it has recently been laid down as a general rule that no authority ought to be implied from a mortgagee to a mortgagor in possession to remove trade fixtures, and that whatever the general rule may be, an express covenant by the mortgagor against removal precludes the implication of any such authority (*r*).

It has also been held, though the decision seems hardly consistent with the judgment of Farwell, L.J., in *Ellis* v. *Glover*, that an equitable mortgagee by deposit of deeds without notice takes subject to a hire-purchase agreement, and that the interest of the mortgagee is postponed to the interest of the vendor of the fixed machinery under the agreement (*s*).

But the protection afforded to trade fixtures, as between the mortgagee and the mortgagor and persons claiming under him, rests entirely on the presumption that the mortgagee must be taken to have assented to the removal of the fixtures by the mortgagor as being necessary for the conduct of his trade or business in its ordinary course; and accordingly no protection will be afforded to the mortgagor if he removes such fixtures not in the ordinary course of his trade or business, but for the purpose of preventing the mortgagee from claiming them (*t*).

Agricultural fixtures.

The protection accorded to trade fixtures as between landlord and tenant has been held not to apply to buildings and fixtures erected or annexed for agricultural purposes (*u*).

The effect of the Agricultural Holdings Acts, 1883 to 1900 (*x*), is that the tenant of an agricultural or pastoral

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(*p*) *Gough* v. *Wood*, (1894) 1 Q. B. 713, C. A.

(*q*) Per Farwell, L. J., in *Ellis* v. *Glover*, *inf.*

(*r*) *Ellis* v. *Glover*, (1908) 1 K. B. 388, C. A.

(*s*) *Re Samuel Allen & Sons, Ltd.*, (1907) 1 Ch. 575.

(*t*) *Huddersfield Banking Co.* v. *Lister*, (1895) 2 Ch. 273, C. A.

(*u*) *Elwes* v. *Mawe*, 3 East, 38; see notes to *S. C.* in 2 Sm. L. C. (11th ed.) 189.

(*x*) 46 & 47 Vict. c. 61; 63 & 64 Vict. c. 50.

holding (including in that expression a market garden) may, with the consent of his landlord, execute upon the land any of the improvements mentioned in Part I. of the schedule to the Act, which include buildings and other works, some of which may be regarded as fixtures; and that the tenant, on the expiration of his tenancy, is entitled to claim compensation from his landlord notwithstanding any agreement to the contrary (*y*).

And by the Tenants Compensation Act, 1890 (*z*), a tenant under a tenancy not binding on the mortgagee is nevertheless given a right to compensation against the mortgagee for crops, improvements, tillages, &c.

Removal of fixtures.

A mortgagee, whether his security be in fee or for a term, may restrain the removal of fixtures (*a*).

If the trustee in bankruptcy of a mortgagor who has mortgaged the lease of a house and the fixtures, sell the fixtures separately, he will be answerable for the sum which the fixtures would have fetched if sold with the house (*b*).

Fixtures are not chattels personal within the reputed ownership clause of the Bankruptcy Act (*c*). As fixtures are part of the soil itself no presumption of ownership arises with regard to them.

Assignment of fixtures apart from land.

Fixtures, when assigned or charged separately from the land, are within the Bills of Sale Acts (*d*), and accordingly no mortgage thereof will be valid unless in conformity with the statutable form and duly registered. But fixtures (except trade machinery as defined by the Bills of Sale Act, 1878), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, are not within the Acts (*e*).

Usual form of proviso.

ix.—Proviso for Redemption.—In mortgages of freeholds, and also generally in mortgages of leaseholds, the old form of proviso for redemption and for avoidance of the mortgage or cesser of the term upon such redemption, has been superseded by a form which is in effect a proviso for reconvey-

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(*y*) *Mears* v. *Callender*, (1901) 2 Ch. 388.

(*z*) 53 & 54 Vict. c. 57.

(*a*) *Ackroyd* v. *Mitchell*, 3 L. T. 236; *Reynolds* v. *Ashby*, (1903) 1 K. B. 87; (1904) A. C. 466.

(*b*) *Thompson* v. *Pettitt*, 10 Q. B. 101.

(*c*) See *post*, Chap. XIV., 1 (iv.).

(*d*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.

(*e*) See *post*, Chap. XIV., 2 (iv.).

ance if the mortgagor should pay the principal debt and interest at the specified time, usually six months after the date of the mortgage.

Contributory mortgage.

If money is to be lent on mortgage in distinct sums by different mortgagees, or sets of mortgagees, who are to be paid *pari passu*, the object may be effected by conveying the land to all the mortgagees, with a proviso for redemption on payment of the mortgage debts and interest to the several lenders, the mortgagor covenanting separately with the different mortgagees for payment of their respective debts and interest; but it is usual to make the mortgage to trustees for the entire sum, the interest of the several lenders being ascertained either by a separate deed or on the face of the mortgage (*f*).

A simpler and shorter form is to frame the mortgage, as between the mortgagor and mortgagee, in all respects on the footing of an ordinary mortgage to joint tenants, though, as between themselves, the mortgagees collectively are trustees of the several sums secured for each of them entitled thereto. But the disadvantage of this form is that no one can call in his money or exercise the powers without the concurrence of the others, and the form is not adapted to a case where the stipulations as to the several sums advanced are not the same (*g*).

Trustees are not justified, unless expressly authorised, in lending on a contributory mortgage (*h*).

Legality and advantage of such provisoes.

x.—Proviso for Reduction of Interest on Punctual Payment.—A clause is not infrequently inserted in mortgage deeds providing for the reduction of the rate of interest on punctual payment, and such a provision may be of service in causing the interest to be regularly and punctually paid (*i*). The legality of such a clause is now established (*k*); but an agreement that the rate of interest shall be raised if interest at the normal rate be not punctually paid, is still regarded as being of the nature

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(*f*) See Davidson's Conveyancing (4th ed.), Vol. II., pt. ii. p. 385.

(*g*) Key & Elphinstone (9th ed.), Vol. II., p. 115.

(*h*) *Post*, Chap. XXIX. § 1 (v).

(*i*) It may be suggested that it will generally be advisable that the difference between the rates of interest should be great enough to offer a material inducement to the mortgagor to pay punctually, but not so great as to render the mortgagee liable to appeals *ad misericordiam* asking him, notwithstanding default, to accept interest at the lower rate, which it might be difficult to resist without the imputation of harshness.

(*k*) *Jory* v. *Cox*, Prec. Ch. 160; *Nicholls* v. *Maynard*, 3 Atk. 519; *Wayne* v. *Lewis*, 25 L. T. 264. See *Wallingford* v. *Mutual, &c. Soc.*, 5 App. Ca. 685, 702.

of a penalty, and to be relieved against even in case of gross default (*l*). But for reasons to be presently mentioned (*m*) it may be doubted whether such a stipulation is any longer invalid.

Condition to be strictly observed.

If any condition as to time or otherwise is attached to a proviso for reduction of interest, such condition, unless waived, must be strictly performed (*n*).

Effect of single default.

But a single default in punctual payment of interest will not utterly defeat an agreement for the reduction of interest, unless this intention clearly appears from the language of the clause. Thus in *Stanhope* v. *Manners* (*o*), in which the agreement was "as often as" the interest should be paid half-yearly on the days appointed, or within three months next after, so much should be deducted as would make the interest three and a half per cent. The first half-year's interest was not paid within the time. The tender of the second half-year's interest (at three and a half per cent.) was made within the limited period, but was refused on the ground that the default made in the first half-year defeasanced and annihilated the agreement. Lord Nottingham thought otherwise, and said that words could not be stronger to express the intent of the parties, that in every instance where the three and a half per cent. was tendered in time, it should be accepted, and decreed accordingly.

Waiver of condition by trustee.

A trustee is justified in accepting interest at the lower rate, after the higher rate fixed by the mortgage has become payable by the strict terms of the contract (*p*).

Parol agreement.

A parol agreement for the reduction of interest secured by a mortgage deed is binding (*q*).

Presumption of agreement.

An agreement for the reduction of interest on punctual payment was not presumed, where interest had in fact been for many years received at a lower rate than that reserved by the mortgage deed, against a subsequent tenant for life of the interest, who was not shown to have agreed to take less than interest at the reserved rate (*r*).

(*l*) *Lady Holles* v. *Wyse*, 2 Vern. 289; *Strode* v. *Parker*, 2 Vern. 316; *Jory* v. *Cox*, *sup.*; *Nicholls* v. *Maynard*, *sup.*; *Walmesley* v. *Booth*, Barn. Ch. R 475; *Burton* v. *Slattery*, 5 Bro. P. C. 233. But see *General Credit Discount Co.* v. *Glegg*, *post*, p. 138.

(*m*) *Post*, p. 140.

(*n*) *Bonafous* v. *Rybot*, 3 Burr. 1375. See *Attwood* v. *Taylor*, 1 Man. & Gr. 279, and *post*, p. 142.

(*o*) 2 Ed. 199. And see *Re Carroll*, (1901) 1 Ir. R. 78; *Williams* v. *Morgan*, (1906) 1 Ch. 804.

(*p*) *Booth* v. *Alington*, 3 Jur. N. S. 49.

(*q*) *Lord Milton* v. *Edgworth*, 5 Bro. P. C. 313.

(*r*) *Gregory* v. *Pilkington*, 8 De G. M. & G. 616.

Mortgagee in possession entitled to interest at the higher rate.

A mortgagee in possession through the default of the mortgagor is entitled to the higher rate (*s*). So also, where the mortgagee has entered into possession by arrangement with the mortgagor, though no interest was in arrear at the time of taking possession (*t*).

But where mortgagees assented to an order for payment out of a fund in Court, and, owing to delay in the completion of the order, the interest was not paid within the time limited for payment at the reduced rate, it was held that the mortgagees must nevertheless accept interest at the reduced rate (*u*).

Covenant for payment of interest at increased rate.

An exception to the rule that the rate of interest shall not be raised if not punctually paid has been said in an old case to exist, where there is a direct covenant for payment of the increased rate in that event (*x*). But this decision may be regarded as overruled by the subsequent authorities (*y*).

Subsequent agreement in consideration of forbearance.

It would seem, however, that an exception to the rule must be made in case the increased rate of interest does not constitute part of the original mortgage contract, but is the result of subsequent and independent agreement in consideration of, and compensation for, forbearance on the part of the mortgagee; in which case, if the compensation be reasonable, the Court will not interfere (*z*). In a modern case (*a*), such a stipulation was enforced as against a second mortgagee until notice that his interest was in arrear. And payment has been enforced of interest at an increased rate on purchase-money on default of payment of the money on a specified day (*b*).

A stipulation that a commission or bonus shall be paid on default in payment of any instalment of the mortgage debt is not a stipulation to pay a higher rate of interest nor of the nature of a penalty, and will therefore be allowed (*c*).

(*s*) *Union Bank of London* v. *Ingram*, 16 Ch. D. 53; *Cockburn* v. *Edwards*, 18 Ch. D. 449.

(*t*) *Bright* v. *Campbell*, 41 Ch. D. 388.

(*u*) *Re Moss*, *Levy* v. *Sewill*, 31 Ch. D. 90.

(*x*) *Marquis of Halifax* v. *Higgens*, 2 Vern. 134. It is stated in Prec. Ch. that the agreement was in a separate deed. See also 15 Vin. Abr. 453; Powell on Mortgages, 963; but it is submitted that this circumstance could make no difference, as the two deeds must be considered as forming one transaction.

(*y*) *Burton* v. *Slattery*, 5 Bro. P. C. 233. See also *Stanhope* v. *Manners*, 2 Ed. 199, n.

(*z*) *Brown* v. *Barkam*, 1 P. Wms. 652. See *Burton* v. *Slattery*, *sup.*

(*a*) *Law* v. *Glenn*, L. R. 2 Ch. 634.

(*b*) *Herbert* v. *Salisbury, &c. Rail. Co.*, L. R. 2 Eq. 221.

(*c*) *General Credit Discount Co.* v. *Glegg*, 22 Ch. D. 548.

Former rule in equity.

xi.—Proviso for Capitalization of Interest.—It was formerly considered in equity that, as a general rule, provisoes in mortgage deeds or collateral agreements, entered into at the time of the loan, for converting interest into principal from time to time as it should become due, were oppressive and unjust, and tended to usury, and, consequently, could not be supported (*d*).

As to validity of such provisoes at the present day.

At the present day it is a generally received opinion that, in the absence of fraud, stipulations entered into at the time of the loan for payment of compound interest are valid, on the ground that the rule against compound interest depended wholly on its contravening the policy of the usury laws, and that accordingly the repeal of the usury laws has virtually abrogated the rule (*e*).

The cases cited by text-writers in support of this view do not appear to be absolutely conclusive, and it seems open to question whether a covenant in a mortgage deed, not being a mortgage of a reversionary interest, that interest in arrear should be capitalized by periodical rests, and thenceforth bear interest, might not even now, except under special circumstances, be rejected as being in itself oppressive and in the nature of a penalty, thereby giving a collateral advantage to the mortgagee and clogging the equity of redemption.

Effect of repeal of the usury laws.

There is no reported decision which expressly bears on this point. But it has been incidentally stated by several learned judges (*f*), that the rule of equity against allowing a mortgagee any collateral advantage beyond his principal, interest, and costs, is unimpaired by the repeal of the usury laws.

But from the judgments in *Bradley* v. *Carritt* (*g*), it clearly appears that the jurisdiction has been affected by the repeal of the usury laws, and that the Court will no longer relieve against a stipulation merely on the ground of its tending to usury, unless it is otherwise oppressive, or a clog on the equity of redemption.

(*d*) *Broadway* v. *Morecraft*, Mosely, 248; *Mitford* v. *Featherstonehaugh*, 2 Ves. S. 445; *Sir Thomas Meer's Case*, cited in Cas. t. Talb. (Williams) 40; *Lord Ossulston* v. *Lord Yarmouth*, 2 Salk. 449; *Chambers* v. *Goldwin*, 9 Ves. 254. And see *Page* v. *Broom*, 4 Cl. & F. 437.

(*e*) *Bradley* v. *Carritt*, *inf.*

(*f*) *Broad* v. *Selfe*, 9 Jur. N. S. 885; *Barrett* v. *Hartley*, L. R. 2 Eq. 789, 795; *James* v. *Kerr*, 40 Ch. D. 449, 460; *Field* v. *Hopkins*, 44 Ch. D. 524, 530. See *Croft* v. *Graham*, 2 De G. J. & S. 155, 161; *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484: *Mainland* v. *Upjohn*, 41 Ch. D. 126, 136, 138.

(*g*) (1903) A. C. 253.

It is difficult to distinguish on principle a stipulation capitalizing interest from a covenant to pay a higher rate of interest on default of punctual payment, which latter covenants have, as we have seen (*h*), been hitherto invariably relieved against as clogging the equity of redemption. But it may be that there is no longer any objection either to such a stipulation or to such a covenant, and both would seem to fall within the principle laid down in *Bradley* v. *Carritt*, that a stipulation, if not oppressive, will be valid, provided it comes to an end when the mortgage is paid off.

Inferentially, therefore, the old rule against compound interest is abrogated. But with one exception there is no direct authority on the point. That exception is the case of *Clarkson* v. *Henderson* (*i*), which has been much relied on as affirming the general validity of covenants for compound interest. But that decision is not conclusive for the reasons given at length in previous editions of this work, and, further, it is a decision on a mortgage of a reversion, and the decision may have turned on that point (*k*). It should also be remembered that even before the repeal of the usury laws an exception to the general rule against compound interest appears to have been allowed in favour of mortgages of reversions (*l*).

A transferee of a mortgage is entitled to capitalize arrears of interest on the original debt due at the date of the transfer and paid by him to the mortgagee, provided the mortgagor joins in the transfer (*m*).

Where there is a proviso for capitalization of interest in arrear a mortgagee in possession, who has in his hands unappropriated rents which he has not applied in payment of interest, is not entitled to say that interest is in arrear within the meaning of the proviso (*n*).

Proof in bankruptcy for capitalized interest.

Where a mortgage of a reversionary interest contained a covenant for capitalization of interest during the life of the tenant for life, and the mortgagor became bankrupt before the reversion fell in, it was held that the mortgagee was not entitled

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(*h*) *Ante*, p. 136.

(*i*) *Clarkson* v. *Henderson*, 14 Ch. D. 348

(*k*) Per Kay, J., in *Mainland* v. *Upjohn*, 41 Ch. D. 126, at p. 143. And see *inf.*

(*l*) *Howard* v. *Harris*, 1 Vern. 190, 194; *Re Fane, Exp. Hope*, W. N. (1888) 231; *Salt* v. *Marquis of Northampton*, (1892) A. C. 1.

(*m*) *Agnew* v. *King*, (1902) 1 Ir. R. 471.

(*n*) *Wrigley* v. *Gill*, (1906) 1 Ch. 165, C. A.

to prove in the bankruptcy for so much of the aggregate sum as represented capitalized interest accrued due after the receiving order (*o*).

Avoidance of bill of sale.

A covenant or provision for the capitalization of interest will render void a bill of sale of chattels as being not in accordance with the form prescribed by the Bills of Sale Act, 1882 (*p*).

Covenant, &c. not to call in principal.

xii.—Provisions as to Postponement of Right to call in Principal—Instalments.—Mortgage deeds sometimes contain a covenant or proviso that the mortgagee will not call in the mortgage money before a fixed date, or before the happening of a specified event, as for instance, the death of a named person (*q*).

Where a covenant to this effect is inserted in a mortgage deed, the forbearance is, according to the usual practice, made conditional upon the regular and punctual payment of the interest, unless capitalized, and upon the performance and observance by the mortgagor of the covenants and obligations on his part contained in or implied by the mortgage.

Form of security in such cases.

The security in these cases is usually so framed as to make the whole debt payable at an appointed, and not distant, date, with a proviso that in default of regular and punctual payment of interest the mortgagee shall be at liberty to sue at once for the whole debt (*r*).

Effect of proviso.

An unqualified agreement that the mortgagee will not call in the debt during the life of the mortgagor (*s*), or before a certain date (*t*), is binding, though the interest falls in arrear; but in settling such an agreement, the Court will insert a condition that the interest shall have been punctually paid, and, if leasehold, that the covenants have been performed (*u*).

Proviso postponing redemption.

A proviso that the principal shall not be called in for a certain period, or shall be payable by instalments, is generally accompanied by a corresponding covenant by the mortgagor that he will not compel receipt of the principal before the expiration of

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(*o*) *Re Fane, Exp. Hope*, *sup.*

(*p*) *Davis* v. *Burton*, 11 Q. B. D. 537, C. A.; *Myers* v. *Elliott*, 16 Q. B. D. 526, C. A.

(*q*) But see *ante*, p. 13.

(*r*) Dav. Conv. Vol. II. pt. ii. p. 49; Key & Elph. 9th ed. Vol. II., p. 130.

(*s*) *Burrowes* v. *Molloy*, 2 J. & L. 521.

(*t*) *Williams* v. *Morgan*, (1906) 1 Ch. 804.

(*u*) *Seaton* v. *Twyford*, L. R. 11 Eq. 591.

the period or the date when the last instalment becomes payable, and such a covenant is binding on the mortgagor (*x*).

But even in the absence of such a covenant by the mortgagor, the Court will not allow him to redeem before the day appointed for payment of the money has arrived (*y*): provided that the period fixed for calling in the money is not so excessive as to render the correlative postponement of the mortgagor's right to redeem oppressive to him, as where the principal was made repayable in twenty years (*z*).

A proviso restraining redemption for twenty-eight years is, it seems, always unreasonable and void, at least where there is no corresponding restriction preventing the mortgagee from calling in his money (*a*).

Where, however, a mortgagee has demanded or taken steps to compel payment, and for this purpose entry into possession is a demand for payment, the mortgagor may redeem without notice and before the time fixed for payment has arrived (*b*).

Where a second mortgage contains a covenant not to call in the principal for a fixed period, the second mortgagee will be precluded, until the expiration of that period, from redeeming the first mortgage and getting in the legal estate (*c*).

Condition strictly enforced.

There is no equitable relief under a proviso not to call in a mortgage debt on punctual payment of interest, if such payment falls into arrear even for a few days only (*d*).

The word "punctual" in such a clause does not mean "within a reasonable time," but "on the days named" (*e*).

Giving time after default no waiver.

If, after default, interest is tendered and accepted, the mortgagee does not thereby waive his right to call in the principal (*f*).

The case of *Langridge* v. *Payne* (*g*) has been erroneously supposed (*h*) to lay down a rule that if a mortgagee, on default in payment of interest, demands and receives payment of the

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(*x*) 20 Ch. D. at p. 729; *Re Hone*, Ir. R. 8 Eq. 65.

(*y*) *Brown* v. *Cole*, 14 Sim. 427.

(*z*) *Cowdry* v. *Day*, 1 Giff. 316; 29 L. J. Ch. 39; *ante*, p. 13.

(*a*) *Morgan* v. *Jeffreys*, (1910) 1 Ch. 620.

(*b*) *Bovill* v. *Endle*, (1896) 1 Ch. 648.

(*c*) *Ramsbottom* v. *Wallace*, 5 L. J. Ch. 92; *Lawless* v. *Mansfield*, 1 Dr. & War. 557. See *Rhodes* v. *Buckland*, 16 Beav. 212.

(*d*) *Hicks* v. *Gardner*, 1 Jur. 541. See *Roddy* v. *Williams*, 3 J. & L. 1.

(*e*) *Leeds and Hanley Theatre of Varieties* v. *Broadbent*, (1898) 1 Ch. 343.

(*f*) *Keene* v. *Biscoe*, 8 Ch. D. 201. See *Williams* v. *Sterne*, 5 Q. B. D. 409, C. A.

(*g*) 2 J. & H. 423.

(*h*) Coote on Mortgages (5th ed.), Vol. I. p. 246.

interest due together with his costs, this will amount to a waiver of his right to call in the principal before the fixed time; but the judgment in that case, as reported, lays down no rule of the kind, but was clearly a mere determination of the balance of convenience until the hearing of the action brought by the mortgagee for possession of the mortgaged property (*i*).

Sale in bankruptcy before period for payment.

If the mortgagor becomes bankrupt, the mortgagee may obtain an order for sale, though the period for calling in the principal has not arrived (*k*).

Proviso for payment of principal by instalments.

Usually, where the principal is made repayable by instalments, the forbearance of the right to call in the whole of the principal is made conditional on the regular and punctual payment of the instalments by means of a proviso that, in default of regular payment, the creditor should be at liberty to sue at once for his whole debt (*l*).

Mines.

Where mines form the subject of a mortgage, it would seem to be a proper arrangement that the money should be made repayable by instalments; the mortgagor will thus have the advantage of paying off the debt gradually out of the profits of the mines, while the mortgagee will be protected against the exhaustion of the security without a corresponding reduction of the debt (*m*).

Where a creditor gave time for payment of an existing debt upon security being given for payment thereof by instalments, on the failure in payment of any one of which the whole debt was to become payable, the condition was strictly enforced (*n*).

Acceptance of instalment after default.

If, after default in payment of an instalment, the mortgagee accepts payment thereof, this is not a waiver of the breach (*o*) so as to disentitle the mortgagee from calling in the whole principal.

Proviso for bonus on default.

A stipulation may be inserted in the mortgage deed that a commission or bonus shall be paid in default of punctual payment of any instalment (*p*).

(*i*) See *Re Taafe*, 14 Ir. Ch. R. 347; *Keene* v. *Biscoe*, 8 Ch. D. at p. 203.

(*k*) *Exp. Bignold*, 3 Deac. 151. See B. A. 1883, s. 9.

(*l*) Dav. Conv. (4th ed.) Vol. II. pt. ii. p. 49; Key & Elph. (9th ed.) Vol. II. p. 130.

(*m*) Dav. Conv. (4th ed.) Vol. II. pt. ii. p. 433.

(*n*) *Sterne* v. *Beck*, 1 De G. J. & S. 595. See *Roddy* v. *Williams*, 3 J. & L. 1; *Edwards* v. *Martin*, 25 L. J. Ch. 284; *Burrowes* v. *Molloy*, 2 J. & L. 521.

(*o*) *Keene* v. *Biscoe*, 8 Ch. D. 201. See *Cowdry* v. *Day*, 1 Giff. 316.

(*p*) *General Credit, &c. Co.* v. *Glegg*, 22 Ch. D. 549.

Former importance of such covenants.

xiii.—Covenants for Insurance against Fire.—Till recently, where the nature of the mortgaged property was such as to require insurance against fire to protect the security from risk of loss, it was the usual practice to insert in the mortgage deed not only covenants by the mortgagor for that purpose, but also a clause empowering the mortgagee to insure in case of default by the mortgagor, and to charge the latter and the mortgaged property with the premiums and interest. This clause was formerly important, as, if the mortgage contained no stipulation to that effect, the mortgagee, whether in possession or not, would not have been entitled to any allowance in respect of payments made by him for insuring the property against fire (*q*). And even where there was a covenant by the mortgagor to insure, but no express power for the mortgagee to insure on the mortgagor's default, it was held that the mortgagee could not be allowed to tack the premiums paid by him against a second mortgagee (*r*). And this rule still applies to all mortgage deeds executed before the 28th of August, 1860, and to all charges whenever made, if not made by deed.

Lord Cranworth's Act.

Lord Cranworth's Act (*s*), which came into operation on that date, gave to mortgagees whose charges were secured by deed a statutory power to insure the mortgaged property, and to add any premiums paid by them to the principal moneys secured, as if such power had been in terms conferred by the person creating the charge. But this enactment is now repealed, except as to instruments executed before the 1st of January, 1882, by the Act next referred to.

Conv. Act, 1881.

By the Conveyancing Act, 1881 (*t*), it is enacted that—

Power to insure incident to estate or interest of mortgagee.

S. 19.—"(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of the Act, have the following power, to the like extent as if it had been in terms conferred by the mortgage deed, but not further, namely:—

(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage

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(*q*) *Dobson* v. *Land*, 8 Hare, 216; *Bellamy* v. *Brickenden*, 2 J. & H. 137.

(*r*) *Brook* v. *Stone*, 13 W. R. 401.

(*s*) 23 & 24 Vict. c. 145, s. 11.

(*t*) 44 & 45 Vict. c. 41.

money, and with the same priority, and with interest at the same rate, as the mortgage money."

And by the same Act, it is enacted as follows :—

Amount and application of insurance money.

S. 23.—"(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by the Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by the Act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no insurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by the Act authorized to insure.

(3.) All money received on an insurance effected under the mortgage deed or under the Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage."

The statutory provisions above set out may be varied or altogether excluded by the mortgage deed ; and they do not apply to mortgage deeds executed before the 1st of January, 1882 (*u*).

These enactments do not import covenant by mortgagor to insure.

It is to be observed that this Act does not imply any covenant by the mortgagor to insure or to produce the policy and receipts for premiums. Covenants of this nature should therefore still be inserted in mortgage deeds, otherwise the mortgagee may have difficulty in ascertaining whether the default in effecting and maintaining an insurance has occurred, which alone gives rise to the mortgagee's statutory power of insuring the property. It is also usual to insert a power enabling the mortgagee to insure or to add provisions supplementing the statutory power (*x*).

(*u*) See sect. 19, sub-sects. (2), (3), and (4), set out *post*, Chap. XLV., Sect. I. (iii).

(*x*) See 54 Sol. J. 358.

Application of policy moneys receivable by mortgagor.

In the absence of special contract, and apart from the above Acts, neither the mortgagor nor mortgagee has any claim to moneys received under a policy effected by the other of them, and apparently cannot insist on the moneys being applied in rebuilding (*x*).

In the absence of a stipulation in the mortgage deed that the policy moneys receivable in respect of an insurance kept up by the mortgagor shall be applied in making good the loss or damage, it was held that the mortgagee could not require the moneys to be so applied, though the mortgage deed contained a covenant by the mortgagor to insure (*y*). Under the Conveyancing Act such a covenant would be sufficient to entitle the mortgagee to require the moneys to be so applied, but in the absence of the covenant he would have no such right, as the insurance in respect of which the moneys would be received would not have been effected either under the mortgage deed or under the Act.

With regard to s. 23, sub-s. (4) of the Act, it must be borne in mind that by the statute 14 Geo. III. c. 78, s. 83 (perpetuated by 28 & 29 Vict. c. 90), directors of insurance companies are in certain cases authorized and required, upon the request of any person interested in any buildings burnt down or damaged by fire, to apply the insurance moneys in restoring the buildings (*z*). A doubt has been expressed whether *Exp. Goreley* was correctly decided (*a*), but having regard to recent cases (*b*) the doubt may be disregarded. The request must be a distinct request and made before the office has settled with the assured (*c*), and the office may be restrained from paying the policy moneys without obtaining security that they will be applied in rebuilding (*d*).

Having regard to s. 2 (vi) of the Conveyancing Act, s. 23 (3) applies to moneys received on an insurance effected by a second mortgagee. On the other hand, a subsequent mortgagee cannot require moneys received on a policy effected by a prior mortgagee to be applied under the section as the latter is not "the mortgagor."

(*x*) See 54 Sol. J. 358.

(*y*) *Lees* v. *Whiteley*, L. R. 8 Eq. 143; *Rayner* v. *Preston*, 18 Ch. D. 1, C. A. See also *Poole* v. *Adams*, 33 L. J. Ch. 639.

(*z*) *Exp. Goreley*, 4 De G. J. & S. 477, doubted 13 App. Ca. 699.

(*a*) 13 App. Ca. at p. 714.

(*b*) *Gaussen* v. *Whatman*, 93 L. T. 101; *Re Quicke*, (1908) 1 Ch. 887.

(*c*) *Simpson* v. *Scottish Union*, 1 H. & M. 618.

(*d*) *Wimbledon* v. *Imperial, &c.*, 18 T. L. R. 813.

Covenant to pay premiums.

It is further to be observed that by s. 19, sub-s. (1) (ii.), of the Act of 1881, premiums paid by a mortgagee in respect of an insurance effected by him under the statutory power are only made a charge upon the mortgaged property, and not a debt for which the mortgagor is personally liable. It is therefore advisable that the mortgage deed should contain an express covenant by the mortgagor for repayment of such premiums.

Joint insurance by mortgagor and mortgagee.

If the mortgagor and mortgagee effect a joint insurance on the mortgaged estate, the mortgagee paying the premiums, and, the premises being destroyed by fire, the mortgagor's assignees procure payment from the company, they will be ordered to pay the insurance money into Court, though they have already paid it to the account in bankruptcy, there being no right in one of the parties, in respect of a joint security, to apply the produce, irrespective of the claims of the other party (*e*).

A policy of insurance against fire, being a strictly personal contract for the indemnity of the assured, is not assignable without the consent of the insurance office, which is usually procured either by an indorsement on the policy, or an entry in the books of the office (*f*). The question whether such assignment vested the right of action at law in the assignee has become of no moment since the Judicature Acts. In the case of a mortgage of property insured under an existing policy, the benefit of the policy would, even without express stipulation, pass to the mortgagee with the property insured (*g*). A different principle applies when the policy is subsequent to the mortgage, and there is no covenant by the mortgagor that the policy moneys shall be applied in payment of the mortgage (*h*). The mortgagor has no equity to be repaid out of the produce of the policy money expended by him about the rebuilding of the property, the expenditure being voluntary (*g*).

A fire insurance being only an indemnity, if the insured receives compensation from other sources, the insurer is entitled to recover it (*i*).

(*e*) *Rogers* v. *Grazebrook*, 12 Sim. 557.

(*f*) Dav. Conv. Vol. II. pt. ii. p. 54; Porter on Ins. 5th ed. 334.

(*g*) *Garden* v. *Ingram*, 23 L. J. Ch. 478.

(*h*) *Lees* v. *Whiteley*, L. R. 2 Eq. 143. See also *Rayner* v. *Preston*, 18 Ch. D. 1, C. A. (case of vendor and purchaser).

(*i*) *Darrell* v. *Tibbits*, 5 Q. B. D. 560, following *North British, &c. Insurance Co.* v. *London, &c. Insurance Co.*, 5 Ch. D. 569.

On the analogy of the cases which decide that a policy against fire by a vendor is, in the absence of contract, avoided after sale for want of interest (*k*), and that a tenant is not entitled to the landlord's insurance effected after the lease (*l*), it would seem that, as between mortgagor and mortgagee, neither of them would be entitled to the benefit of an insurance effected by the other subsequently to the mortgage, in the absence of stipulation to the contrary (*m*).

Covenants for title implied by virtue of statute.

xiv.—**Covenants for Title.**—Covenants for title do not enlarge or increase the extent or operation of the security. They are really ancillary to the assurance, and ought not, in the absence of clear words, to be extended so as to confer a larger estate than is expressly assured, and still more ought not to be so construed as to enable the grantee to claim property as free from charges or incumbrances to which in the operative part of the deed it is expressly made subject (*n*).

Mortgage deeds formerly, according to the usual practice, contained express covenants for title by the mortgagor. Such covenants were in their general character similar to those inserted in purchase deeds, differing only in their greater comprehensiveness. The insertion of such covenants is now rendered generally unnecessary by virtue of the provisions of sect. 7 of the Conveyancing Act, 1881 (*o*), which implies the usual covenants.

Effect of this enactment.

The statutory covenants are, by the appropriate words, imported into and implied in any "conveyance" by way of mortgage (*p*); the term "mortgage" includes "any charge on any property for securing money or money's worth," but the covenants will not be implied unless the charge is by way of conveyance or assurance.

Covenants for title run with the land.

These covenants are entered into with the mortgagee, his heirs and assigns, and run with the land (*q*). The covenant for right to convey is obviously of very little use during the continuance

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(*k*) *Poole* v. *Adams*, 33 L. J. Ch. 639.

(*l*) *Leeds* v. *Cheetham*, 1 Sim. 146; *Llofft* v. *Dennis*, 1 E. & E. 474.

(*m*) Dav. Conv. Vol. II. pt. ii. p. 56; *ante*, p. 146.

(*n*) *Nottidge* v. *Dering*, (1910) 1 Ch. 297, per Cozens-Hardy, M. R.

(*o*) 44 & 45 Vict. c. 41. As to covenants for title implied by virtue of the statute in mortgages of leaseholds, see *post*, p. 175.

(*p*) 44 & 45 Vict. c. 41, s. 2 (vi). See *ibid*. s. 7, sub-s. (6).

(*q*) As to the operation of covenants for title absolute or unqualified, see *Thackeray* v. *Wood*, 6 N. R. 305. See also Sug. V. & P. 600—609.

of the mortgage, as the mortgagee, by bringing an action on it, could only recover his mortgage money, and that he could more easily obtain by suing on the covenant for the payment of the money. But this covenant, as also the other covenants for title, become valuable after a foreclosure or sale, as they then stand in lieu of the common covenants for title contained in purchase deeds, and are, indeed, the more valuable on account of their being absolute, instead of qualified (*r*).

Covenant for quiet enjoyment.

The covenant for quiet enjoyment is made to commence, in point of operation, after default in payment of the mortgage money on the day appointed in the proviso for redemption; but this form of covenant does not (in the absence of a proviso for quiet enjoyment until default amounting to a demise) postpone the mortgagee's right of entry, or disable him from bringing ejectment at once (*s*).

Covenant for further assurance.

It scarcely need be noticed that the mortgagor cannot, under his covenant for further assurance, on default in payment, be called upon to release his equity of redemption, and that he can, under such covenant, be required to confirm the mortgage only (*t*).

Whether subsequent covenant for production of deeds may be required.

The covenant for further assurance will not, apparently, entitle the mortgagee to require the mortgagor to enter into a covenant for production of the title deeds to the mortgaged property, if not handed over to the mortgagee on completion of the mortgage, or in lieu thereof, to give to the mortgagee the statutory acknowledgment of his right to the production of the deeds, and undertaking for safe custody thereof (*u*); to entitle him to do so would be to allow him to obtain protection on evidence which he might and ought to have obtained at the time of the mortgage (*x*).

Implied indemnity against incumbrances.

Where a person sold part of property comprised in a mortgage, and the conveyance to the purchaser did not mention the mortgage, but contained a covenant for further assurance, it was held that, the conveyance being for value, the covenant imported

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(*r*) See also, as to the effect of the statutory covenants for title implied by conveying "as beneficial owner," *David* v. *Sabin*, (1893) 1 Ch. 523, 532, C. A.

(*s*) *Doe* v. *Lightfoot*, 8 M. & W. 553.

(*t*) *Bankes* v. *Small*, 36 Ch. D. 716, C. A. See *inf.* n. (*y*).

(*u*) *Fain* v. *Ayres*, 2 S. & St. 533. The marginal note to the report of that case is obviously inaccurate; production was ordered, apparently, on the ground of an equity independent of any covenant for further assurance.

(*x*) See *Hallett* v. *Middleton*, 1 Russ. 243.

an indemnity against incumbrances, and that the unsold part of the property must bear the mortgage debt. The effect of such a covenant is to enable the covenantee to call upon the covenantor to pay off the mortgage (*y*).

As trustee-mortgagors do not convey as "beneficial owners" but "as trustees," so as only to give by implication the statutory covenant that they have not incumbered, a person taking a mortgage from trustees cannot claim the benefit of a covenant for further assurance; but, inasmuch as the mortgagee will become a person beneficially interested under the settlement or will, he will, as such, have a right to production of the title deeds relating to the mortgaged property, independently of any covenant.

It has been suggested that the covenant for further assurance should extend to confirm a foreclosure or a sale, at the expense of the person requiring it (*z*).

Whether covenantor can be required to perfect a disentailing assurance.

This covenant appears to operate only to secure to the covenantee the precise estate or interest purported to be conveyed to him by the deed in which the covenant is contained (*a*). So, where a tenant in tail, conveying as absolute owner, purports to convey the fee simple, but really conveys only a base fee, the covenant may be extended so as to bind the grantor to execute a deed to completely bar the estate tail, and in such a case the covenant will be enforced (*b*); but if the fact that the grantor is only tenant in tail appears on the face of the deed, and there is nothing to show that it was the intention of the parties that the base fee created by the deed should be enlarged, it seems very doubtful whether the grantor could be required, under a covenant for further assurance in the usual form contained in a mortgage deed, to execute a deed converting the base fee into a fee simple (*c*).

But if the original contract between the parties shows that such was the intention, the grantor will be compelled under his covenant for further assurance to pass to the grantee any estate or interest which the former may acquire in the property con-

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(*y*) *Re Jones, Farrington* v. *Forrester*, (1893) 2 Ch. 461, 474. See *Re Darby's Estate*, (1908) 2 Ch. 465.

(*z*) Dav. Conv. (4th ed.) Vol. II. pt. ii. p. 111.

(*a*) *Atkins* v. *Uton*, 1 Ld. Raym. 36. See *Exp. Vanderkiste, Re Roche*, 25 L. R. Ir. 284, C. A.

(*b*) *Bankes* v. *Small*, 36 Ch. D. 716, C. A. See *Re Ottley*, (1910) 1 Ir. R. 1.

(*c*) *Davis* v. *Tollemache*, 2 Jur. N. S. 1181.

veyed subsequently to the conveyance, even though he acquire it by purchase (*d*). So where a mortgagor who was entitled to a moiety only assigned the whole, and subsequently acquired the other moiety as next of kin, the Court made the second moiety available to render the assignment effectual (*e*). So where a mortgagor conveyed a contingent remainder in fee and covenanted for further assurance, and the remainder was afterwards destroyed by the tenant of the prior estate, the mortgagor was held liable in equity to perfect the security out of a new interest in the same property which he took under the will of that tenant (*f*). It would seem, however, that in this case the enforcement of the equitable right of the mortgagee to have the security perfected might have been upheld on the ground of estoppel, independently of any covenant for assurance (*g*).

The fact that the grantee has a title by estoppel is no defence to an action for specific performance of a covenant for further assurance (*h*).

If a conveyance has been destroyed or lost, it would seem that under the covenant for further assurance the covenantor may be required to execute a duplicate thereof (*i*).

Covenant to produce.

The retention of any of the title deeds by the mortgagor should seldom be permitted, but it is occasionally necessary, in which case the mortgagor should give an acknowledgment of right to production and an undertaking for safe custody. A memorandum of the mortgage should also, as a rule, be indorsed on one or more of the deeds (*k*).

xv.—Statutory Form of Mortgage.—The Conveyancing Act, 1881 (*l*), s. 26, enacts that—

"(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage,

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(*d*) *Taylor* v. *Debar*, 1 Ch. Ca. 212. See also *Pye* v. *Daubuz*, 3 Bro. C. C. 595; *King* v. *Sims*, 5 Taunt. 427; *Smith* v. *Baker*, 1 Y. & C. C. C. 223; *Heath* v. *Crealock*, L. R. 10 Ch. 31.

(*e*) *Re Bridgwater*, (1910) 2 Ch. 342.

(*f*) *Noel* v. *Bewley*, 3 Sim. 116; *Re Hoffe*, 82 L. T. 556.

(*g*) See *Seabourne* v. *Powell*, 2 Vern. 11; *Jennings* v. *Blincorne*, 2 Vern. 609; *Jones* v. *Kearney*, 1 Dr. & War. 134, 151.

(*h*) *Bensley* v. *Burdon*, 8 L. J. Ch. 85.

(*i*) *Bennett* v. *Ingoldsby*, Finch. 962. See *Napper* v. *Lord Allington*, 1 Eq. Ca. Ab. 166.

(*k*) As to acknowledgment where the mortgagor and mortgagee join in conveying the property, see *Re Pursell and Deakin*, (1893) W. N. 152.

(*l*) 44 & 45 Vict. c. 41.

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being in the form given in Part I. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require (*m*), and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of the Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money.

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall reconvey the mortgaged property to the mortgagor, or as he shall direct."

This clause imposes no statutory personal liability on an assignee of the equity of redemption (*n*).

By sect. 28 of the same Act it is enacted that—

"In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him."

xvi.—Assignment of outstanding Terms.—It was a common practice to keep on foot long terms of years, after the original purposes of their creation had been satisfied, and on every mortgage of the inheritance to assign them to a trustee for the mortgagee's protection (*o*). The assignment of satisfied terms,

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(*m*) The form may be varied "for giving effect to special arrangements." See 1 & 2 Geo. 5, c. 37, s. 15.

(*n*) *Re Errington*, (1894) 1 Q. B. 11.

(*o*) *Shaw* v. *Johnson*, 1 Dr. & S. 412; *Owen* v. *Owen*, 3 H. & C. 88.

however, is now rendered impracticable by 8 & 9 Vict. c. 112, which has consequently deprived the mortgagee of a valuable means of protection against incumbrances (*p*). The mortgagee, however, should not dispense with the assignment of a term on the occasion of a mortgage, unless he has the surest ground for concluding that the term is satisfied within the meaning of the Act prior to his mortgage (*q*). The Act only extends to freeholds, and such customary lands as will pass by deed, or deed and admittance, and not by surrender (*r*); it consequently does not affect a term created by sub-demise.

xvii.—Collateral Securities.—Collateral securities may properly be prepared by separate deeds, in order to avoid mixing up in one deed the title to separate properties. The title to the freehold is kept distinct from the dealings connected with the subject-matter of the collateral security. Discrimination, however, is required to determine when separate deeds should be taken (*s*).

The inclusion in the same mortgage of several estates, the ownership of which may subsequently be severed, is often productive of inconvenience.

xviii.—Execution and Delivery of Mortgage Deed. — The question whether a deed is delivered as an escrow or not is a question of intention. The surrounding circumstances may show that it was intended as an escrow though the delivery is absolute in form (*t*). A deed may be delivered as an escrow though delivered to a party taking under it, and evidence is admissible to show the terms upon which it was delivered (*u*).

If a deed which has been executed in blank, and is not a deed at the time, comes back into the custody of the grantor, he can redeliver it (*x*). But if it does not come back into his possession, redelivery will not be assumed from the conduct of the grantor in treating the deed as valid (*y*).

(*p*) *Shaw* v. *Johnson, sup.;* Carson, R. P. Stat. 522.

(*q*) *Doe* v. *Price*, 16 M. & W. 603; *Doe* v. *Jones*, 13 Jur. 824.

(*r*) See sect. 3.

(*s*) Dav. Conv. (4th ed.) Vol. II. pt. ii. 532.

(*t*) *Gudgen* v. *Besset*, 6 E. & B. 986; *Lloyds Bank* v. *Bullock*, (1896) 2 Ch. 192.

(*u*) *London Freehold, &c. Co.* v. *Suffield*, (1897) 2 Ch. at p. 621.

(*x*) *Hudson* v. *Revett*, 5 Bing. 368.

(*y*) *Powell* v. *London and Prov. Bank*, (1893) 2 Ch. 555, 563.

CHAPTER XI.

MORTGAGE OF COPYHOLDS.

Conditional surrender.

i.—Mortgage by Conditional Surrender.—Mortgages of copyholds, on account of the peculiar nature of the tenure, retain in general their primitive form. They usually consist of a conditional surrender by the mortgagor to the mortgagee and his heirs. The surrender may be made in the manor court, but is now frequently made out of court (*a*) to the steward or his deputy, unless the custom of the manor requires it to be made before the tenants. By the condition, the surrender is made void on payment by the mortgagor, &c., of principal and interest to the mortgagee, &c., on a given day; the condition is entered on the rolls, and immediately follows the surrender.

Separate deed of defeasance.

The condition may, however, be contained in a separate deed of defeasance, of even date with the surrender; but, as remarked by Mr. Watkins (*b*), this mode should never be resorted to when it can be avoided; for the defeasance may be lost, and then, as the surrender is absolute on the rolls, the proof of the condition may be difficult; and besides, the title to the lands should always appear on the records of the manor; and, therefore, even if a separate deed of defeasance be executed, it should be always entered on the rolls.

Another important reason against having an absolute surrender with a separate deed of defeasance formerly existed, viz., that if the mortgagee died without an heir, the lord of the manor might have entered for the escheat, inasmuch as he had no notice of the condition on his court rolls (*c*). But if the lord had notice of the condition for redemption, or of any trusts, although

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(*a*) If the surrender was made out of court, it was sometimes permitted to be vacated for want of a proper presentment, and a new surrender was taken. See *Fawcet* v. *Lowther*, 2 Ves. Sen. 304. But now presentment by the homage is not essential to the validity of an admission. See 4 & 5 Vict. c. 35, s. 90.

(*b*) 1 Watk. Cop. 116.

(*c*) *Att.-Gen.* v. *Duke of Leeds*, 2 My. & K. 343.

only referred to as subsisting in a separate deed, he was bound; and if the trusts were by way of mortgage security, the mortgagor was entitled to re-admittance on payment of the debt (*d*).

Escheat and forfeiture.

The legal rights of the lord claiming by way of escheat, in default of heirs or forfeiture, are, however, now placed under the control of the Chancery Division, for the benefit of the parties beneficially entitled (*e*); so that there is little or no risk of either mortgagor or mortgagee being prejudiced by the escheat or forfeiture of the other's tenancy.

Necessity of surrender.

The money ought not to be advanced till the surrender is actually made, for a second mortgagee without notice may take a surrender and be admitted, and thus, having the legal estate, gain priority (*f*). On performance of the condition by payment of the money on the day appointed, the surrender is at an end, and the land reverts to the surrenderor, as of his former estate, without any re-admission or fine (*g*); but if the day of payment is past, the surrenderor, having only an equity of redemption, must apparently, in strictness, pay a fine and be re-admitted (*h*). Whether the money is paid at the day or not, if the surrenderee has not been admitted, it is considered sufficient in practice to enter satisfaction on the rolls on payment of the mortgage debt, without requiring the mortgagor to be re-admitted (*i*).

Mortgagor tenant till admission of mortgagee.

As well in the case of a conditional as of an absolute surrender, the surrenderor remains tenant to the lord until the admission of the surrenderee (*k*), and as well for the purposes of forfeiture and escheat, as for other purposes (*l*); so much so that prior to 55 Geo. III. c. 192, the mortgagor could not, after the conditional surrender and before the admission of the surrenderee, devise the copyholds without a previous surrender to the use of his will (*m*).

Mortgagee not usually admitted.

It is not usual for a mortgagee to be admitted, for if he is admitted and the condition is broken by the non-payment of the money, his estate is absolute, and he becomes liable to the pay-

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(*d*) *Weaver* v. *Maule*, 2 R. & My. 97.

(*e*) See 56 & 57 Vict. c. 53, s. 26, and 4 & 5 Will. IV. c. 23, and 13 & 14 Vict. c. 60, ss. 15, 46, both of which enactments are now repealed.

(*f*) *Oxwick* v. *Plumer*, Bac. Abr. Mortgage, E (7th ed.), Vol. V. p. 664.

(*g*) *Simonds* v. *Lawnd*, Cro. Eliz. 239.

(*h*) Gilb. Ten. 276.

(*i*) 1 Scriv. Cop. (4th ed.) 194; (5th ed.) 129.

(*k*) 1 Scriv. Cop. (7th ed.) 108.

(*l*) *Rex* v. *Mildmay*, 5 B. & Ad. 254.

(*m*) *Doe* v. *Wroot*, 5 East, 132; *Kenebel* v. *Scrafton*, 8 Ves. 30. See also Gilb. Us., 3rd ed. p. 73, n.

ment of rents and heriots and to the performance of the services, which is frequently undesirable; and when the mortgage is paid off, a re-admission and fresh fees and fine will be necessary, and the mortgagor will thereupon gain a new estate, and the descent be altered; so that if the lands had originally descended to him *ex parte maternâ,* they will afterwards descend as if he had taken by purchase (*n*).

Whether lord can compel admittance of mortgagee.

Unless there is a special custom in the manor, by which the lord may compel a surrenderee to come in and be admitted, he cannot, it seems, compel the mortgagee to be admitted, even after condition broken (*o*); but if there is such a custom in the manor, it seems he may compel him, and the Court will not give relief (*p*).

Conditional surrender to uses as mortgagee appoints.

The practice of framing conditional surrenders to such uses as the mortgagee should appoint in order to save the expense of a double admittance cannot successfully be resorted to; as the lord is not bound to enrol such surrender, since it tends to interfere with the fruits of tenure (*q*). But if the lord accept the surrender, he cannot afterwards refuse to act on it (*r*).

Deed of covenants to accompany surrender.

ii.—Deed of Covenants for or on Surrender.—In effecting a mortgage of copyholds it is necessary that there should be a deed, in addition to the surrender, for the purpose of containing covenants by the mortgagor for payment of principal and interest and for title, and other covenants and provisions which may be necessary for carrying out the terms of the contract, and for the purpose of conferring on the mortgagee a power of sale on default, which cannot be contained in, or implied by, the surrender itself.

This deed may be executed either previously to, contemporaneously with, or after the surrender. According to the more usual and better practice, the deed is executed previously to the surrender, and is in the form of a covenant to surrender the lands, containing also the ancillary covenants and provisions. Even when the deed of covenants precedes the surrender, the deed and surrender are considered to be parts of one and the

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(*n*) *Benson* v. *Scott*, 4 Mod. 251; *Doe* v. *Morgan*, 7 T. R. 103.

(*o*) *Basspool* v. *Long*, Cro. Eliz. 879; *King* v. *Dilliston*, 1 Salk. 386.

(*p*) *Tredway* v. *Fotherley*, 2 Vern. 367. See Scriv. Cop. (7th ed.) 128.

(*q*) *Flack* v. *Downing Coll.*, 13 C. B. 945.

(*r*) *Eddlestone* v. *Collins*, 3 De G. M. & G. 1.

same transaction (*s*). So, where a surrender was made referring to a previous deed, which stated on the face of it that the surrender was made as a security for money, it was held that the deed and surrender must be taken together as forming a mortgage, and that upon the death of the surrenderee the lord must admit his heirs on payment of the customary fine (*t*). A receipt clause should be inserted in the body of the deed of covenants, or indorsed thereon.

Payment of fines and expenses.

It is not usual, in mortgages of copyholds, to provide by special covenants for the payment by the mortgagor of all fines, costs, and expenses attendant on admittance, and other incidents of copyhold property; the matter is left to the general rule of law, and undoubtedly the mortgagor would not be permitted to redeem until after repayment to the mortgagee with interest of any such sum as the latter might have been compelled to expend. The case differs considerably from that of leaseholds, where renewal is optional; but it is sometimes thought advisable to arm the mortgagee with a covenant for payment of the sums he might be compelled, or might find it desirable, to expend by reason of the copyhold tenure. If the copyholds be held for lives, the mortgage (*u*) should contain the usual provisions for renewal and payment of the fines.

Covenants for title.

A covenant to surrender copyholds by way of mortgage is a "conveyance," and an equitable charge is a "mortgage" within the meaning of the Conveyancing Act, 1881 (*x*); and it is clear that a covenant to surrender copyholds creates a valid equitable charge thereon. If, therefore, a mortgagor covenants "as beneficial owner" to surrender, it seems clear that the mortgagee will thereby obtain the benefit of the implied statutory covenants for right to convey, quiet enjoyment, free from incumbrances, and further assurance, and also of the implied statutory powers of sale and other powers of a mortgagee under the Act.

Power of sale.

The powers of sale, &c., given by sects. 19—24 of the Act apply only when the mortgage is by deed, and are, therefore, not implied by virtue of a conditional surrender not made in pursuance of an antecedent deed of covenant. In such a case a proviso expressly charging the property should be inserted in

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(*s*) *Riddell* v. *Riddell*, 7 Sim. 529.

(*t*) *Weaver* v. *Kinglake*, 9 L. J. Ch. 20.

(*u*) Dav. Conv. (4th ed.), Vol. II. pt. ii. p. 588.

(*x*) 44 & 45 Vict. c. 41, s. 2 (5).

the deed of covenants accompanying the surrender, so as to confer such powers on the mortgagee, or the deed should, according to the former practice, contain full powers of sale, &c., with the ancillary clauses (*y*).

Insurance of lives.

In mortgages of copyholds for lives, it is usual to insure the lives of the *cestuis que vie* for further security, and in such case the deed will contain covenants for keeping up the policies. But where money is raised by the Court upon such property, the persons entitled cannot be compelled to insure (*z*).

Second surrender by mortgagor.

iii.—Rights, &c. of unadmitted Mortgagee.—Until after the mortgagee has been admitted, the mortgagor may, in the meantime, make a second surrender, which will be good if the first surrender is not perfected by admittance (*a*). But although the first surrender is not inrolled, the second mortgagee, though without notice of the former, does not, by the inrolment of his surrender, acquire priority (*b*), unless by the custom of the manor there was a limited time for presenting surrenders made out of Court; and the same applies to an intermediate purchaser (*c*).

Ejectment.

A mortgagee who has not been admitted cannot maintain ejectment, unless, in the case of a tenant of the mortgagors, the relation of landlord and tenant has been created *aliunde* (*d*). But, inasmuch as a subsequent admittance will relate back to the date of the surrender, the mortgagee may, after admittance, recover in ejectment against, and also mesne profits from, a purchaser who has been admitted under a later surrender (*e*).

Foreclosure.

After condition broken, and before admittance, the mortgagee may bring his action to foreclose (*f*), and, if no surrender has been made, he may compel the mortgagor to surrender at his own expense (*g*), unless the covenant to surrender otherwise provides (*h*).

(*y*) Having regard to the doubt raised by an eminent conveyancer (see Wolst. Conv. 8th ed. p. 74), as to whether a mortgage by conditional surrender will import the statutory powers, it will be prudent, in settling such a deed, to insert a charging clause, and also the usual declaration of trust until surrender. See Key & Elph. (9th ed.), Vol. II. p. 40.

(*z*) *Grantley* v. *Garthwaite*, 6 Madd. 96.

(*a*) *Burgaine* v. *Spurling*, Cro. Car. 283.

(*b*) *Horlock* v. *Priestley*, 2 Sim. 75.

(*c*) *Doe* v. *Gibbons*, 7 Car. & P. 161.

(*d*) *Rayson* v. *Adcock*, 9 Jur. N. S. 800, C. P.

(*e*) *Holdfast* v. *Clapham*, 1 T. R. 600; *Rex* v. *Mildmay*, 5 B. & Ad. 254; *Benson* v. *Scott*, 4 Mod. 251; *Doe* v. *Gibbons*, 7 Car. & P. 161.

(*f*) *Sutton* v. *Stone*, 2 Atk. 101.

(*g*) *Pryce* v. *Bury*, 2 Drew. 41.

(*h*) *Hill* v. *Price*, Dick. 344.

If a surrenderee to him and his heirs dies before admittance, his heir may be admitted (*i*).

Death of mortgagor before admittance of mortgagee.

If the mortgagor dies before the admittance of the mortgagee and a heriot is paid, and the mortgagee afterwards dies, and his heir claims to be admitted, Mr. Watkins (*k*) makes a query, whether, inasmuch as the admittance of the surrenderee or his heir always relates to the time of the surrender so as to avoid all intermediate rights and interests contrary to the surrender, such as the freebench of the surrenderor's widow, and the like (*l*), or even an intermediate purchase, a heriot will not on such admittance become due, as if the surrenderee had died seised; and, if so, whether the lord ought not to return the first heriot. Arguing from principle, it would seem that such would be the law; for, after the admittance of the heir of the surrenderee, it would be difficult to contend that, *fictione juris*, the surrenderee died seised, so as to avoid the widow's freebench, &c., but not so as to give the lord a right to his heriot, and the law would scarcely permit the lord to hold both. But the case has not been decided.

It has, however, been held, in the case of customary freeholds, that a mortgagor in possession is not so seised thereof that on his death the lord is entitled to claim a heriot (*m*).

Release of condition.

After the conditional surrenderee has been admitted, he becomes tenant to the lord, and the surrenderor may, before condition broken, release to him the benefit of the condition (*n*), and, after condition broken, he may release to him the equity of redemption; and no fine will in either case be necessary, for the mortgagee is already in possession, and on his admittance a fine has been already paid (*o*).

Fraudulent surrender set aside in favour of mortgagee.

Where a surrender and admittance of a purchaser has been entered on the court rolls in such a manner as would be a fraud upon an intended mortgagee, who had advanced his money upon the security of the property, the Court will, upon the consent of the lord being given, or his being a party to the suit, order the entry to be reformed (*p*).

(*i*) Vin. Abr. tit. "Copyholds," 98.

(*k*) 2 Watk. Cop. 4th ed. p. 111, n.

(*l*) *Benson* v. *Scott*, 4 Mod. 251; *S. C.*, 12 Mod. 49; *Vaughan* v. *Atkins*, 5 Burr. 2785.

(*m*) *Copestake* v. *Hoper*, (1908) 2 Ch. 10.

(*n*) *Hull* v. *Sharbrook*, Cro. Jac. 36; *Kite and Queinton's Case*, 4 Rep. 25.

(*o*) *Kite and Queinton's Case*, *sup.*

(*p*) *Elston* v. *Wood*, 3 My. & K. 678.

Right of mortgagee of copyholds to obtain enfranchisement.

By the Copyhold Act, 1894 (*q*), a surrenderee by way of mortgage under a surrender entered on the court rolls, in possession, or in receipt of the rents and profits of land, is to be deemed a tenant within the meaning of that Act, and entitled to obtain or join in obtaining and effecting enfranchisement. Any money paid by him for that purpose is to be added to the amount due to him as mortgagee; and the land is not to be redeemable without payment of such money with interest thereon.

Effect of enfranchisement.

By sect. 20 of the same Act (*r*), a mortgage of copyholds becomes, on enfranchisement, a mortgage of the freehold, but subject to any charges under the Act for consideration money, interest, and expenses of enfranchisement (*s*).

Mortgage of equity of redemption.

An equity of redemption in copyholds, being an equitable estate only, may be effectually mortgaged by deed, without surrender.

Devolution of equity of redemption.

For the same reason an equity of redemption in copyholds will, on the death of the mortgagor, devolve to his legal personal representative under the Land Transfer Act, 1897 (*t*).

(*q*) 57 & 58 Vict. c. 46, ss. 1, 39, 94.

(*r*) Re-enacting in effect the corresponding provision of the repealed Copyhold Act, 1841 (4 & 5 Vict. c. 35), s. 81.

(*s*) See as to enfranchisements, *post*, Chap. XXII., Sect. II. (iv.).

(*t*) *Re Somerville and Turner*, (1903) 2 Ch. 583.

CHAPTER XII.

MORTGAGE OF LEASEHOLDS.

Liability of mortgagee by assignment.

i.—Mortgage of Leaseholds by Assignment.—A mortgage of leaseholds may be by assignment of the whole unexpired residue of the term. It has long been settled, and it is now clear, both on principle and sound authority, that if a mortgagee accepts an assignment *of all the remaining interest in the term*, he will be liable to the payment of the rent, and performance of the covenants in the original lease, so long as he shall be the legal owner thereof, although he shall not take actual possession of the premises (*a*). The Court will not, on the one hand (*b*), assist the lessor in an action brought by him against the mortgagee for a discovery of the deed of assignment to him and for a specific performance of the covenants, but will leave the lessor to his remedy; so neither will it, on the other hand (*c*), after the lessor has obtained judgment against the mortgagee for the arrears of rent, give the mortgagee relief, although he has never been in possession.

Cesser of mortgagee's liability on transfer of mortgage.

In case of mortgage by assignment, the liability of the mortgagee on the covenants ceases on transfer or sale and assignment (*d*).

Depositee of lease not liable on covenants.

It was formerly supposed that a depositary of a lease was liable for the rent and covenants in a suit by the lessor (*e*). But it is now clear that a depositary of a lease is not answerable for the rent and covenants of the lease, and the landlord cannot compel him to take, or the mortgagor to execute, an assignment,

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(*a*) *Traherne* v. *Sadlier*, 5 Bro. P. C. 179; *Williams* v. *Bosanquet*, 1 Br. & B. 238; 3 Moo. 500; *Burton* v. *Barclay*, 7 Bing. 745; *Haig* v. *Homan*, 4 Bli. N. S. 38. See *Re Loom*, (1910) 2 Ch. 230.

(*b*) *Sparkes* v. *Smith*, 2 Vern. 276.

(*c*) *Pilkington* v. *Shaller*, 2 Vern. 374.

(*d*) *Onslow* v. *Currie*, 2 Madd. 330.

(*e*) *Lucas* v. *Comerford*, 3 Bro. C. C. 166; *Flight* v. *Bentley*, 7 Sim. 149.

even if the depositary has been in possession and paid rent (*f*). In such a case, though not liable for the rent and covenants under the lease, he would apparently be liable in respect of his tenancy.

Forfeiture by mortgagor.

Where judgment by default has been taken against a mortgagor-lessee for forfeiture, the equitable depositee of the lease can set aside the judgment under Ord. XXVII. r. 15, and defend in the name of the lessee, indemnifying him (*g*).

Form of mortgage by demise.

ii.—Mortgage of Leaseholds by Demise.—It has been generally recommended that a mortgage of leaseholds should be by way of underlease, in order to avoid rendering the mortgagee liable for the rent and covenants of the original lease. In framing such mortgages, the practice is to demise the property to the mortgagee, reserving the last day, or the last few days of the original term, and to make the mortgagor covenant to pay the rent and perform the covenants in the original lease. It is also usual to insert in such mortgages a declaration by the mortgagor that he will stand possessed of the nominal reversion in trust for a purchaser on any sale by the mortgagee under his power, or else in trust for the mortgagee himself. The form of declaration more frequently adopted in practice has been that of a declaration of trust in favour of a purchaser; but it may be regarded as settled that a declaration of trust in favour of the mortgagee himself will not render him liable to the lessor for the rent and covenants of the lease (*h*); nor entitle the lessor to require him to take an assignment of the lease (*i*).

Effect of declaration of trust of reversion.

The mortgagor should declare that he will hold the nominal reversion upon trust for the mortgagee, and power should be given to the mortgagee to remove the mortgagor from the trust and to appoint himself or some other person as trustee in the mortgagor's place. The mortgagee can then, under sect. 12 of the Trustee Act, 1893, appoint himself or the pur-

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(*f*) *Moore* v. *Greg*, 2 De G. & Sm. 304; 2 Ph. 717; *Walters* v. *The Northern Coal Mining Co.*, 5 De G. M. & G. 629; *Cox* v. *Bishop*, 8 De G. M. & G. 815. See *Newry Rail. Co.* v. *Moss*, 14 Beav. 64; *Wright* v. *Pitt*, L. R. 12 Eq. 408.

(*g*) *Jacques* v. *Harrison*, 12 Q. B. D. 165, C. A. See *North London Land Co.* v. *Jacques*, W. N. (1883) 187; 49 L. T. 659.

(*h*) *Walters* v. *Northern Coal Mining Co.*, 5 De G. M. & G. 629.

(*i*) *Moore* v. *Greg*, 2 De G. & S. 304; *Friary, &c.* v. *Singleton*, (1899) 2 Ch. 261.

chaser to be trustee of the reversion, and vest it by a vesting declaration (*k*).

Where an equitable mortgage has been made with an agreement or declaration to vest the reversion in the mortgagee when called upon, a vesting order may be made under sect. 26 of the Trustee Act, 1893 (*l*).

It has been held that a mere covenant for the assignment of the nominal reversion upon a sale, in such manner as the purchaser should require, would not render the mortgagor trustee for a purchaser, so as to enable the latter to obtain an order under the Trustee Act (*m*) vesting in him the outstanding reversion (*n*). It is, however, conceived that this is no longer law.

Indemnity against rent and covenants.

It also seems clear that the mortgagor, after a sale, will be entitled, on the ordinary footing of a trustee, to claim an indemnity from the purchaser in respect of the rents and covenants (*o*).

A mortgagee of leaseholds by sub-demise in the usual form is not himself liable to the head lessor for rent or other outgoings, whether he is in possession or not (*p*).

Forfeiture of lease.

A mortgage security by way of underlease is, however, affected by the possibility of a breach of covenant by the mortgagor, whereby the lease may become liable to forfeiture, and, in such case, independently of the statutory enactments hereafter referred to, the mortgagee has no remedy against the lessor (*q*).

The effect of recent legislation and decisions has been to alter materially the incidents formerly considered to attach to mortgages by demise, as regards the risk of forfeiture of the original term.

Conv. Act, 1881, s. 14.

In the first place, the right of a lessor to enforce forfeiture has been to a great extent restricted. By the Conveyancing Act, 1881 (*r*), s. 14, it is enacted as follows:—

Restrictions on and relief against forfeiture of leases.

"(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition

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(*k*) *London and County Banking Co.* v. *Goddard*, (1897) 1 Ch. 642.

(*l*) *Re Crowe's Mortgage*, L. R. 13 Eq. 26.

(*m*) 56 & 57 Vict. c. 53, ss. 26, 31.

(*n*) *Re Propert*, 22 L. J. Ch. 948. And see *Re Carpenter*, Kay, 418, 420. But see *London and County Banking Co.* v. *Goddard*, (1897) 1 Ch. 642.

(*o*) *Phene* v. *Gillam*, 5 Ha. 1, 9.

(*p*) *Hand* v. *Blow*, (1901) 2 Ch. 721.

(*q*) *Nokes* v. *Fish*, 3 Drew. 735; *Hughes* v. *Howard*, 25 Beav. 575.

(*r*) 44 & 45 Vict. c. 41.

in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

By sub-sect. (2), where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may apply to the Court for relief; and the Court may grant or refuse such relief on such terms as it may think fit.

And by sub-sect. (3), for the purposes of this section a lease includes an original or derivative underlease, and a lessee includes an original or derivative underlessee and assigns of a lessee, *i.e.*, assigns of a legal estate (*s*).

Effect of this section.

It has been decided that the effect of the last sub-section is merely to make the provisions of the section applicable as between a derivative lessor and his lessee, and not to create new statutory rights between an original lessor and a derivative lessee claiming under his lessee, between whom no privity of contract exists (*t*).

This section does not extend to covenants and conditions against assigning, underletting, &c. (*u*); and the Court cannot, under the Act, relieve against forfeiture for breach of such covenants (*x*).

Nor does the section extend, in the case of mining leases, to covenants and conditions to allow the lessor to inspect books, workings, &c. (*u*).

The section does not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

Conv. Act, 1892, s. 2.

Leases are sometimes made determinable by re-entry on bankruptcy of the lessee (*y*). Under the Act of 1881, s. 14 thereof is limited, by sub-sect. (6) thereof, so as not to extend to a condition for forfeiture on the bankruptcy of the lessee, or on the

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(*s*) See *Friary, &c. Brewery* v. *Singleton*, (1899) 1 Ch. 86; (1899) 2 Ch. 261.

(*t*) *Nind* v. *Nineteenth Century Building Society*, (1894) 2 Q. B. at p. 232, C. A.

(*u*) 44 & 45 Vict. c. 41, s. 14, sub-s. 6.

(*x*) *Barrow* v. *Isaacs*, (1891) 1 Q. B. 417, 430.

(*y*) See as to this, *Exp. Gould, Re Walker*, 13 Q. B. D. 454; *Smith* v. *Gronow*, (1891) 2 Q. B. 394.

taking in execution of the lessee's interest. But by the Conveyancing Act, 1892 (*z*), s. 2, it is enacted as follows :—

Forfeiture in case of bankruptcy or execution.

> "Sub-sect. (2).—Sub-sect. 6 of sect. 14 of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-sect. 6 shall cease to be applicable thereto.
>
> Sub-sect. (3).—Sub-sect. 2 of this section is not to apply to any lease of:—
>
> (a) Agricultural or pastoral land;
> (b) Mines or minerals;
> (c) A house used or intended to be used as a public-house or beershop;
> (d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures;
> (e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him."

The effect of this enactment seems to be that if the lessee of property falling thereunder, subject to a mortgage by sub-demise, becomes liable to forfeiture by bankruptcy, such forfeiture will be suspended for a period of one year from the date of the bankruptcy, during which period the lease will remain subsisting so as to support the security ; and if the trustee sells the beneficial interest in the lease, the assignee will, of course, take subject to the mortgage, so that there will be no further risk of the mortgagee losing his security by forfeiture of the lease by reason of that particular bankruptcy.

Conv. Act, 1892, s. 4.

Moreover, where a lessor is proceeding to enforce forfeiture, the mortgagee by sub-demise may avail himself of sect. 4 of the Conveyancing Act, 1892, to adopt the position of assignee of the lease. This section enacts as follows :—

Power of Court to protect underlessees on forfeiture

> "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as under-lessee any estate or interest in the property com-

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(*z*) 55 & 56 Vict. c. 13.

of superior leases.

prised in the lease, or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease, or any part thereof, in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease."

This section is not a section merely amending s. 14 of the Conveyancing Act, 1881, but is an independent enactment, and therefore relief can be given to an underlessee against a forfeiture of the head-lease for non-payment of rent (*a*).

Definition of "lease" and "underlease" for purposes of above enactments.

The terms "lease" and "underlease" are defined by sect. 5 of the Act to include respectively an agreement for a lease and an agreement for an underlease; and by the same section the term "underlessee" is to include any person deriving title under or from an underlessee.

Relief when and how given.

The underlessee must apply for relief before the lessor has re-entered; but *quære* whether this would be so where the underlessee is a mere mortgagee not in possession and without notice (*b*).

Wider relief may be given under this section to an underlessee than the lessee could ask for, and he may get relief even when the original lease is forfeited (*c*), but he ought not to derive any pecuniary advantage from the forfeiture (*d*).

The powers of the Court under the section, as to the terms of the vesting order, seem far wider than those under the similar provisions in the Bankruptcy Acts to be presently mentioned (*e*).

Conv. Act, 1892, s. 2.

By sect. 2, sub-sect. (1), of the Conveyancing Act, 1892, it is enacted that—

Costs of waiver and forfeiture in bankruptcy and execution.

"A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise in reference to

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(*a*) *Gray* v. *Bonsall*, (1904) 1 K. B. 601, C. A.

(*b*) *Rogers* v. *Rice*, (1892) 2 Ch. 170, distinguishing *North London Land Co.* v. *Jacques*, 9 Q. B. D. 672.

(*c*) *Imray* v. *Oakshette*, (1897) 2 Q. B. 218, C. A.

(*d*) *Ewart* v. *Fryer*, (1901) 1 Ch. 499, C. A.

(*e*) *Post*, p. 167.

any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act."

Effect of this enactment.

It has been decided that the expression "lessee," as used in this sub-section, and in sect. 14 of the Act of 1881 (*f*), does not include an underlessee of the whole of the premises comprised in the head-lease (*g*), and, *à fortiori*, the expression does not include an underlessee of a part only of the premises comprised therein (*h*). The result is that the superior lessor cannot recover from a mortgagee, by underlease of the whole or of part of the premises comprised in the lease, the expenses mentioned in the sub-section above set out.

Effect of disclaimer of lease in bankruptcy.

Whether or not there be a clause in the head-lease providing for forfeiture on bankruptcy, and independently of the consequences to the mortgagee of a breach of covenant by the mortgagor, which have been considered above, a mortgage security by way of underlease is further affected by the possibility of the bankruptcy of the mortgagor supervening during the continuance of the security, and of the exercise thereupon by the trustee in bankruptcy of the powers of disclaimer conferred upon him by the Bankruptcy Act, 1883 (*i*).

Leave to disclaim mortgaged lease.

Under sect. 55 (3) of this Act, if the bankrupt has created any mortgage or charge on the property, the leave of the Court must be obtained for a disclaimer; and, in such a case, a disclaimer without leave will be void (*k*). It seems, however, that, in the case of an equitable mortgage, the disclaimer will be restricted to the equity of redemption. So, it was held that a trustee of a lessee bankrupt will not be allowed to disclaim so as to prejudice the depositee of a lease, but if he assign the lease to the depositee, the latter must covenant to indemnify him from liability under the lease (*l*).

In a later case (*m*), where the property had been sub-demised by way of mortgage, it was distinctly laid down that the power of the Court to give leave to disclaim was to be exercised with a view to the administration of the bankrupt's estate for the

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(*f*) 44 & 45 Vict. c. 41.

(*g*) *Nind* v. *Nineteenth Century Building Society*, (1894) 2 Q. B. 226, C. A.

(*h*) *Burt* v. *Gray*, (1891) 2 Q. B. 98.

(*i*) 46 & 47 Vict. c. 52, s. 55.

(*k*) B. R. 1890, r. 69.

(*l*) *Exp. Buxton, Re Müller*, 15 Ch. D. 289, C. A.

(*m*) *Exp. East and West India Dock Co., Re Clarke*, 17 Ch. D. 759, C. A.

benefit of all persons interested in that administration, without taking into account collateral considerations as to the injuries which might be occasioned to third parties by the disclaimer. But the position of the mortgagee in that case was not affected by the decision; for, if a mortgagee claims under a legal underlease, the disclaimer of the lease by the trustee will not avoid the mortgage or affect the rights and remedies of the mortgagee as against the property (*n*). If, however, the mortgagee is in possession, the lessor will be entitled to distrain on the property if the mortgagee fails to pay the rent reserved by the original lease, or to re-enter on such default or for breach of the covenants contained in that lease (*o*).

Power of Court to vest lease in mortgagee by underlease or to deprive him of his security.

By sub-sect. (6) of sect. 55 of the last-mentioned Act, the Court is empowered, after a disclaimer has been made, and upon the application of persons claiming an interest in the disclaimed property, to make an order vesting the property in any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation, on such terms as the Court thinks just, subject to the following proviso, viz., "That where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or underlessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property."

Whether vesting order renders mortgagee liable as original lessee or as assignee.

In *Re Finley, Ex parte Clothworkers' Company* (*p*), a doubt was raised by Lord Justice Lindley whether, upon the true construction of this proviso, a mortgagee by sub-demise, who has obtained a vesting order pursuant to this section, is liable to the covenants and obligations of the original lease only as an assignee of the lease, or to the same extent as if he were the original lessee. The Act of 1883 is now supplemented by

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(*n*) *Smalley* v. *Hardinge*, 7 Q. B. D. 524, C. A. See 8 & 9 Vict. c. 106, s. 9.

(*o*) *Exp. Walton, Re Levy*, 17 Ch. D. 746, C. A.

(*p*) 21 Q. B. D. 475, at p. 487, C. A.

sect 13 of the Bankruptcy Act, 1890 (*q*), which enacts as follows:—

> "The Court may, if it thinks fit, modify the terms prescribed by the proviso in sub-section 6 of the same section, so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order."

The result appears to be that, where the mortgagor is the original grantee of the lease, in order to obtain a vesting order rendering the mortgagee liable only to the covenants and obligations of the lease as assignee, the mortgagee must claim that the usual vesting order may be modified in accordance with the provision of the Act of 1890, but that, where the mortgagee fails to put forward any such claim, or the Court for any reason refuses to make the order as asked, the usual vesting order will be made, and the mortgagee will become liable to the covenants and obligations as original lessee.

Discretion of Court.

If the exercise of the discretion in favour of the mortgagee will place him in no better position and the lessor in no worse position than if there had been no disclaimer, the discretion ought to be exercised in favour of the mortgagee (*r*).

Assignment of underlease to trustee.

The liabilities and obligations referred to cannot be escaped by an assignment of the underlease to a trustee for the mortgagee before leave to disclaim is applied for by the trustee in bankruptcy (*s*).

Lessor may apply for vesting order.

It is now decided that the lessor is a "person claiming an interest in the disclaimed property," so as to be entitled to apply for an order vesting the lease in the sub-lessee or for delivery of the property if the sub-lessee refuses to take a vesting order (*t*).

No disclaimer where the mortgage is by assignment.

The trustee in bankruptcy of an assignor by way of mortgage of leaseholds need not disclaim the burden of the lessee's covenants, inasmuch as the mortgagee is the owner of the land so burdened, and the trustee's equity of redemption is a mere equitable right to which the covenants do not attach until reconveyance (*u*).

(*q*) 53 & 54 Vict. c. 71.

(*r*) *Re Carter and Ellis, Exp. Savill*, (1905) 1 K. B. 735, C. A.

(*s*) *Re Smith, Exp. Hepburn*, 25 Q. B. D. 536, C. A.

(*t*) *Re Cock, Exp. Shilson*, 20 Q. B. D. 343; *Re Finley, Exp. Clothworkers' Co.*, 21 Q. B. D. 475; *Re Baker*, (1901) 2 K. B. 628.

(*u*) *Re Gee, Exp. Official Receiver*, 24 Q. B. D. 65.

Mortgagee of part.

Where a lessee of land mortgaged by sub-demise four portions of it to different mortgagees, and did not deal with the remaining portion, on his becoming bankrupt and his trustee in bankruptcy disclaiming the lease, it was held that the mortgagees were entitled to a vesting order of the whole of the land by way of compensation for their liability to pay the whole of the ground rent (*x*).

Comparative advantages of mortgages by assignment and underlease.

The result of the foregoing observations seems to be that the form of the mortgage should still be in some degree determined by the amount of the rent and nature of the covenants to which the leaseholds are subject. If the rent be trifling, and the covenants not of a kind likely to be burdensome, the mortgage should be made by assignment, because it is expedient that the mortgagee should have the whole legal interest, rather than a mere derivative estate. It is expedient both for the purpose of a sale, and because it precludes the mortgagor from forfeiting, or doing other mischief with, the nominal reversion which is left in him by an underlease. If, however, the rent be large, or the covenants burdensome, for which the mortgagee as assignee will be liable, it is submitted that the mortgage should still be made by underlease. A mortgage by demise still confers on the mortgagee the advantage of not being rendered immediately subject, as in the case of a mortgage by assignment, to the liabilities and obligations of a lessee (*z*), and in the event of the mortgagor's bankruptcy, the effect of the statutory enactments above referred to is to give to the mortgagee by demise the option of accepting these liabilities and obligations of an assignee, or (if he prefers to do so) of abandoning his security and relying on the covenant for payment and proof in the bankruptcy for the debt.

Effect of covenant against assignment, &c.

iii.—**Effect of Covenant not to Assign or Underlet.**—Where a lease contains a covenant not to assign or sublet without licence, no mortgage, either by assignment or demise, will be valid unless the licence is obtained. But a covenant not to assign will not extend to subletting (*a*), nor will a covenant not to sub-let restrain an assignment (*b*); and a mortgage

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(*x*) *Re Holmes, Exp. Ashworth*, (1908) 2 K. B. 812.

(*z*) *Holford* v. *Hatch*, 1 Doug. 183; *Earl of Derby* v. *Taylor*, 1 East, 502.

(*a*) *Crusoe* v. *Bugby*, 2 W. Bl. 766; *Church* v. *Brown*, 15 Ves. 258, 265. See (1902) 1 Ch. 731.

(*b*) *Re Doyle*, (1899) 1 Ir. R. 113.

by sub-demise is a breach of a covenant not to assign or underlet (*c*).

Formerly, in order that an assignment should create a forfeiture, the instrument must have been valid and effectual at law (*d*). So where a lease contained a covenant on the part of the lessee not to let or otherwise part with "the said messuage or this present indenture of lease," it was held that an equitable mortgage by deposit of the lease was not a breach of the covenant (*e*); and upon a petition in bankruptcy by the equitable mortgagee by deposit (unaccompanied by any written memorandum) of a lease granted to the bankrupt, his executors, administrators, and permissive assigns, the usual order for sale was made (*f*). And the same rule would apparently have applied to any merely equitable security for money advanced where the mortgagee obtained no legal title.

This rule does not seem to have been altered by the Judicature Act, and consequently a covenant not to assign is still only broken by a legal and not by an equitable assignment (*g*).

So a covenant by a lessee not to mortgage is not broken by a deposit of the lease, even though accompanied by a letter giving a lien (*h*).

Renewal by mortgagee.

iv.—Renewal of Lease.—It is decided that if the mortgagee of a leasehold estate obtain a renewal of the lease, although there subsisted only a tenant right, the renewed lease will be held subject to the like equity as subsisted in the old lease, and will be redeemable accordingly (*i*); the mortgagee, however, is not bound to renew, and in case he does, will be entitled to his costs in effecting the renewal, with interest (*k*) at the rate reserved on the original principal (*l*).

The rule is that the renewed lease must be treated as engrafted on the old, and as forming part of the mortgage

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(*c*) *Serjeant* v. *Nash*, (1903) 2 K. B. 304.

(*d*) *Doe* d. *Lloyd* v. *Powell*, 5 B. & C. 308.

(*e*) *Doe* v. *Hogg*, 4 D. & R. 226; *Doe* v. *Laming*, Ry. & M. 36.

(*f*) *Exp. Drake*, 1 M. D. & De G. 439.

(*g*) *Gentle* v. *Faulkner*, (1900) 2 Q. B. 267, C. A.

(*h*) *Simmons* v. *Montague*, (1909) 1 Ir. R. at p. 93.

(*i*) *Rushworth's Case*, Freem. Ch. 13; *Rakestraw* v. *Brewer*, 2 P. Wms. 511. See *Keech* v. *Sandford*, Sel. Ca. in Ch. 61; Wh. & Tud. L. C. in Eq. (7th ed.), Vol. II. p. 693.

(*k*) *Lacon* v. *Mertins*, 3 Atk. 4; *Godfrey* v. *Watson*, 3 Atk. 518; *Manlove* v. *Bale*, 2 Vern. 84.

(*l*) *Woolley* v. *Drag*, 2 Anstr. 551.

security (m). This, however, is not a presumption of law, but at most a rebuttable presumption of fact. *Primâ facie* a mortgagee cannot renew for himself, but the presumption is apparently rebuttable (n).

The above rule, however, only applies when the mortgagee obtains a renewal behind the back, or in fraud, of those who were interested in the old lease, and where there is either a remnant of the old lease, or a tenant right of renewal on which the old lease could be engrafted. And, therefore, in a case where, after a mortgage of a lease, the landlord recovered in ejectment for non-payment of rent, and the nine months allowed by the Irish statute to redeem had elapsed without redemption either by mortgagor or mortgagee, and the mortgagee gave notice to the mortgagor that he should not redeem, and acted without fraud, a new lease, granted by the lessor to the mortgagee at the expiration of the nine months, was held to belong to him absolutely, although the agreement had been entered into during the nine months (o).

When a renewable lease is made the subject of mortgage, a covenant should be introduced on the part of the mortgagor for concurring at his own expense in all lawful acts for obtaining a renewal, for otherwise the mortgagee cannot compel him to do so (p). And there should be added an agreement that, if he refuses, it shall be lawful for the mortgagee to renew and to charge the estate with the costs and interest; for though the mortgagee has, independently of any special agreement, a right to renew, in which case the estate will be redeemable only on payment of the costs and interest, yet he cannot bring an action to compel the mortgagor to renew, nor to recover expenses of a renewal made by himself without an express agreement to that effect. When freeholds are mortgaged with leaseholds, the provision charging the costs of renewal and interest on the whole of the mortgaged property should be inserted, and would be useful in preventing questions as to priority with subsequent incumbrancers (q).

Necessary parties to action for renewal.

Where an action was brought by the transferee of a mortgage to compel the renewal of a lease for lives, it was held that the executors of the mortgagor were necessary parties because his estate was liable to the costs of renewal (*r*).

(m) *Re Biss*, (1903) 2 Ch. 40, per Romer, L.J.

(n) *Ibid.* at p. 56, per Collins, M.R.

(o) *Nesbitt* v. *Tredennick*, 1 Ba. & Be. 29, see at p. 47.

(p) *Lacon* v. *Mertins*, *sup.*; *Manlove* v. *Bale*, 2 Vern. 84.

(q) Dav. Conv. (4th ed.) Vol. II. pt. ii. p. 64.

Release of right to renew.

A release by the mortgagee of the right of renewal will not be binding on the mortgagor or his representative claiming a right to redeem (*s*).

Where a tenant for life of renewable leaseholds mortgages his life estate, the liability to renew will follow the mortgagee in respect of the rents received by him; though, if the mortgagee's security is set aside, and he be obliged to refund the rents to the trustee in bankruptcy of the tenant for life, he will not be personally liable for any past default in not renewing, but the fine must be paid out of the refunded rents (*t*).

Renewal by mortgagor.

If, on the other hand, the mortgagor renew, although not in accordance with the covenant to renew, the new lease will be held to be a graft on the old one, and subject in equity to the same mortgage as affected the old lease (*u*). And such equity will defeat any lien of the mortgagor's solicitor for his costs (*x*).

Purchase of fee by mortgagor.

Where the mortgagor renders the renewal of the lease impossible by himself purchasing the reversion in fee, and so merging the lease, the estate so acquired is subject in equity to the mortgage (*y*).

Notice to lessor.

A mortgagee of leaseholds for lives subject to renewal should give notice of the mortgage to the lessor, otherwise the lease may be forfeited by non-payment of fines by the mortgagor, and the mortgagee would have no remedy (*z*).

Effect of new lease on covenant to pay.

v.—**Surrender of Lease.**—If a lessee mortgages his lease with a covenant for payment of the debt, and then both parties join in surrendering the lease for the purpose of having a new lease granted, and it is agreed that it shall be assigned to the mortgagee, and that the arrangement shall not prejudice any other security of the mortgagee, the covenant in the original

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(*r*) *Gregson* v. *Hindley*, 7 Jur. 248.

(*s*) *O'Reilly* v. *Fetherstone*, 4 Bli. N. S. 161.

(*t*) *Halkes* v. *Barrow*, Taml. 264.

(*u*) *Moody* v. *Matthews*, 7 Ves. 174; *Sims* v. *Helling*, 21 L. J. Ch. 76; *Yem* v. *Edwards*, 1 De G. & J. 598; *Hughes* v. *Howard*, 25 Beav. 575.

(*x*) *Smith* v. *Chichester*, 2 Dr. & War. 393.

(*y*) *Trumper* v. *Trumper*, L. R. 8 Ch. 870. And see *Evans* v. *Walshe*, 2 Sch. & L. 519; 12 R. R. 88, n.; *Randall* v. *Russell*, 3 Mer. 190; *Hardman* v. *Johnson*, 3 Mer. 347; *Postlethwaite* v. *Lewthwaite*, 2 J. & H. 237; *Leigh* v. *Burnett*, 29 Ch. D. 231.

(*z*) See *Galbraith* v. *Cooper*, 8 H. L. C. 315.

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mortgage deed is not extinguished by the surrender of the lease (*a*); and it is conceived that the result would be the same without such agreement, inasmuch as the covenant to pay is, as has been seen (*b*), not an essential part of the mortgage so as to stand or fall with it, but is an independent collateral security.

Effect of surrender.

A surrender by a mortgagor-lessee will not destroy charges previously created by the surrenderor (*c*). The estate surrendered has, in consideration of law, a continuance to protect such charges (*d*).

So where a tenant surrenders his lease to the landlord, a mortgagee from the tenant has a right to remove fixtures within a reasonable time (*e*).

vi.—Covenants for Insurance against Fire.—In framing covenants relating to insurance of leasehold property, care must be taken that the stipulations are not repugnant to any covenants for insurance which are contained in the original lease. As, for instance, if the covenant in the lease be for the lessee to insure in the name of the lessor, it must not be stipulated that the mortgage insurance shall be in the name of the mortgagee; for if it were so, the mortgagor would be obliged to keep up two insurances instead of one. It is not right, however, for the mortgagee to rely on the covenant in the original lease; he should insist on having a covenant for insurance on which he can himself sue (*f*).

The statutory powers of mortgagees to insure the mortgaged property and to charge the same with the cost of insurance have been already set out and considered (*g*). It is obvious that where, under the covenants or provisions of a lease, a sufficient insurance is kept up, either by a lessee-mortgagor, or, as is usual, by the lessor charging the lessee with the premiums, the statutory powers do not arise (*h*).

(*a*) *Greenwood* v. *Taylor*, 14 Sim. 505; *S. C.*, *sub nom. Att.-Gen.* v. *Cox*, 3 H. L. C. 272.

(*b*) *Ante*, p. 9.

(*c*) *Pheasant* v. *Benson*, 14 East, 234, 238; *Doe* v. *Pyke*, 5 M. & S. 146.

(*d*) Co. Litt. 338 b; *Clements* v. *Matthews*, 11 Q. B. D. 808, 815.

(*e*) *Re Glasdir Copper Mines*, (1904) 1 Ch. 819.

(*f*) Dav. Conv. Vol. II. pt. ii. p. 121.

(*g*) *Ante*, pp. 144 *et seq.*

(*h*) 44 & 45 Vict. c. 41, s. 23 (iii).

Chap XII. (vii.)

vii. **Statutory Covenants for Title.** Under the Conveyancing Act, 1881 (*i*), in a conveyance by way of mortgage of leaseholds by a person conveying as beneficial owner, there are deemed to be included covenants for the validity of the lease, and payment of the rent, and performance of the covenants therein. The form of the covenants is set forth in the section, which only applies to mortgages made after the commencement of the Act, as follows:—

Validity of lease.

> "That the lease or grant creating the term or estate for which the land is held is, at the time of the conveyance, a good, valid, and effectual lease or grant of the land conveyed, and is in full force, unforfeited, and unsurrendered, and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed and performed, have been paid, observed and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent, or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them."

This form is probably applicable to a mortgage by demise, though its language seems only to refer to a mortgage by assignment (*k*).

(*i*) 44 & 45 Vict. c. 41, s. 7 (1, D).

(*k*) See *Capital and Counties Bank* v. *Rhodes*, 71 L. J. Ch. 573, reversed on other grounds, (1903) 1 Ch. 631.

CHAPTER XIII.

MORTGAGES OF INCORPOREAL HEREDITAMENTS.

What passes by the word "manor."

i.—Mortgage of Manor.—The word "manor" has a wide signification, including (i) the demesne lands of which the lord is seised within the manor; (ii) the freehold of all lands held by copyholders within the manor; (iii) waste lands; (iv) all heriots, fines, rents, suits, and services; (v) courts baron, courts leet, and other franchises (*a*).

Customary freeholds held of a manor are not parcel of a manor, though the rents and services issuing out of such lands will pass by grant of a manor.

An advowson appendant to a manor will pass by conveyance of the manor (*b*).

Mortgagor may hold courts.

The mortgagor of a manor, while in possession, may, it seems, hold courts (*c*).

Purchase of copyholds by lord after mortgage of manor.

A mortgage of a manor will carry with it copyholds of that manor subsequently purchased by and surrendered to the lord (*d*); and the mortgagee is entitled to all accretions to the property (*e*).

Receiver.

A receiver may be appointed of a manor (*f*).

ii.—Mortgage of Advowson.—An advowson is not an eligible security for money advanced, as it yields no profits out of which the interest can be kept down, and the policy of the law has imposed serious restrictions on the rights and remedies of a mortgagee of this kind of property.

Right of mortgagor

Though the legal right to present to the benefice, whether

(*a*) Cru. Dig. tit. xxxii. ch. 21.

(*b*) Shep. Touchst. by Preston, 92.

(*c*) Scriv. Cop. (5th ed.) 91, note.

(*d*) *Doe* v. *Pott*, 2 Doug. 709. See Scriv. Cop. (4th ed.) 43; (5th ed.) 6.

(*e*) *Exp. Bisdee*, 1 M. D. & De G. 333.

(*f*) *Thelluson* v. *Woodford*, 13 Ves. 209; Seton, 767.

to nominate incumbent on vacancy.

appendant or in gross, is vested in the mortgagee (*g*), he can make no profit thereby, so as to renew or lessen the debt, not only because such a transaction would be void on the ground of simony, but also because, until foreclosure or sale, the mortgagee is but in the nature of a trustee for the mortgagor, who has a right to nominate, and may, in equity, compel the mortgagee to present the person so nominated (*h*), notwithstanding an express agreement to the contrary (*i*).

If the mortgagee presents, and his clerk is inducted, the mortgagor may bring his action to compel resignation, but the action must be brought within six months from the death of the last incumbent, or it will be dismissed (*k*).

Power of sale not exerciseable during vacancy.

It is obvious, therefore, that an advowson can only be made available as a security by means of a power of sale, which, however, even if made under the direction of the Court, cannot be exercised during a vacancy so as to confer the right to present from that turn, contrary to the law of simony (*l*). But the power may be exercised if the benefice is not actually vacant, though a vacancy is known to be pending (*m*).

Benefices Act, 1898.

A mortgage of an advowson is still permitted by the Benefices Act, 1898, s. 1 (7), at all events where more than twelve months have elapsed since the last institution to the benefice and subject to registration. It can be enforced by sale or foreclosure, but under the last-mentioned Act a sale cannot be made by public auction except in conjunction with a manor or an estate of not less than one hundred acres (*n*).

Laches.

An advowson is not within the Statute of Limitations, but after a long delay without acknowledgment an action for foreclosure will be dismissed on the ground of laches and stale demand (*o*).

Mortgages of the profits of a benefice, which are forbidden except for certain purposes, will be considered in a later chapter (*p*).

(*g*) *Dyer* v. *Lord Craven*, 2 Dick. 662; *Croft* v. *Powell*, Com. Rep. 609.

(*h*) *Jory* v. *Cox*, Prec. Ch. 71; *Amhurst* v. *Dawling*, 2 Vern. 401.

(*i*) *Mackenzie* v. *Robinson*, 3 Atk. 559. See *Gally* v. *Selby*, Stra. 403.

(*k*) *Gardiner* v. *Griffith*, 2 P. Wms. 404; *Mutten* v. *Chancel*, 1 Mer. 493.

(*l*) *Bishop of Salisbury* v. *Wolferston*, 3 Burr. 1504; *Mirehouse* v. *Rennell*, 1 Moo. & Sc. 683.

(*m*) *Alston* v. *Attlay*, 7 A. & E. 289; *Barton* v. *Glubb*, Dick. 516; *Fox* v. *Bishop of Chester*, 1 Dow & C. 416.

(*n*) 61 & 62 Vict. c. 48.

(*o*) *Brooks* v. *Muckleston*, (1909) 2 Ch. 519.

(*p*) Chap. XXIV.

iii.—Mortgage of Rectories Impropriate and Tithes.—Rectories impropriate and tithes or tithe rentcharge in lay hands may be mortgaged in like manner as any other kind of real estate.

Merger of tithes.

Incumbrancers of tithes are not affected by statutory merger of the tithes so as to give the incumbrancers of the lands in which the tithes are merged any priority over the holders of incumbrances affecting the tithes before the merger (*q*).

Statutes of Limitation.

The law relating to rectories impropriate and tithes has received great emendations by Acts of Parliament passed for limiting the periods for making claim to such species of property; prior to such statutes, the rule prevailed, *nullum tempus occurrit ecclesiæ,* so that it was, in all cases of claim to impropriate tithes, necessary to show by what means the tithes came into lay hands; and, in cases of claim of exemption from tithes, to show the origin of such claim (*r*). But it is not now necessary to show the legal origin of the claim (*s*). The mere non-payment, for the prescribed period, where done adversely and of right, establishes a new ground of exemption (*t*). But the non-payment must be a total non-payment of tithes of every kind (*u*), and the consent or agreement in writing capable of defeating the evidence arising from the non-payment of tithe, or payment of modus, must cover the whole or some part of the period set up by the tithe-payer (*x*). And in a case in the Exchequer, the Court held that the claim of a *modus* from time immemorial might be pleaded notwithstanding the statute, and be supported by the same evidence that would have been sufficient before the statute, though not extending over so long a period as that named in the statute (*y*).

It has been likewise held that the same Act does not apply where the title to the tithes is in dispute, and not the liability to pay them (*z*). In like manner, 3 & 4 Will. IV. c. 27, only applies as between adverse parties claiming an estate in the

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(*q*) 2 & 3 Vict. c. 62, s. 1; 9 & 10 Vict. c. 73, s. 19.

(*r*) See 2 & 3 Will. IV. c. 100, as to moduses and compositions real: 6 & 7 Will. IV. c. 71, as to impropriate tithes; and 41 & 42 Vict. c. 42, as to computation of tithes.

(*s*) *Salkeld* v. *Johnston*, 14 Jur. Pt. I. 1. And see *Champneys* v. *Buchan*, 4 Drew. 104.

(*t*) *Fellows* v. *Clay*, 3 G. & D. 406.

(*u*) *Salkeld* v. *Johnston*, 2 C. B. 749.

(*x*) *Toynbee* v. *Brown*, 18 L. J. Ex. 99.

(*y*) *Earl of Stamford* v. *Dunbar*, 13 M. & W. 822.

(*z*) *Knight* v. *Marquis of Waterford*, 15 M. & W. 419.

tithes (not being tithes due to a spiritual or eleemosynary corporation sole), and does not bar the tithe owner from recovering tithes as chattels from the occupier, although none have been set out for the space of twenty years (*a*).

The Act 2 & 3 Will. IV. c. 100, is unaffected by the provisions of 3 & 4 Will. IV. c. 27; the interpretation clause of the latter Act, although enacting that the word "land" shall, in its meaning, extend to tithes, has reference to an estate in tithes, and not to tithes as a chattel; and sect. 2, therefore, does not embrace the case of a render of tithes as a chattel by the person bound to pay to the tithe owner (*b*).

Actions for tithes must be brought within six years from the time when such tithes became due (*c*), and the defendant may avail himself of the Act without pleading it (*d*).

Form of mortgage.

iv.—Mortgage of Rentcharges.—A mortgage may be made of a subsisting rentcharge, or of a rentcharge created at the time and for the purposes of the security. In the former case the form of the mortgage will not materially differ from that of a mortgage of land, and the same form may be adopted in the case of a newly-created rentcharge, but in such cases the form of the security is more commonly that of an absolute grant of the rentcharge with power of repurchase (*e*).

Statute of Limitations.

A personal covenant to pay a rentcharge cannot be enforced after twelve years from the last payment (*f*).

Arrears of rentcharge.

The statute 3 & 4 Will. IV. c. 27, s. 42, provides that no arrears of rent are to be recovered after more than six years from the time at which they become due, or an acknowledgment in writing is given by the debtor. This provision was apparently intended to apply exclusively to rentcharges, and not to other rents (*g*).

Statutory remedies.

By the Conveyancing Act, 1881 (*h*), s. 44, the insertion in grants of rentcharges of powers of distress and entry, and of limitations of terms to trustees to secure rentcharges, are rendered unnecessary.

(*a*) *Dean of Ely* v. *Cash*, 15 M. & W. 617.

(*b*) *Dean of Ely* v. *Bliss*, 2 De G. M. & G. 459.

(*c*) 53 Geo. III. c. 127, s. 5.

(*d*) *Goode* v. *Waters*, 20 L. J. Ch. 72.

(*e*) See as to annuity deeds, *ante*, pp. 37 *et seq.*

(*f*) *Shaw* v. *Crompton*, (1910) 2 K. B. 370.

(*g*) *Paget* v. *Foley*, 3 Sc. 120.

(*h*) 44 & 45 Vict. c. 41. See as to these provisions, *ante*, p. 39.

CHAPTER XIV.

MORTGAGES OF CHATTELS.

SECTION I.

THE NATURE AND INCIDENTS OF MORTGAGES OF CHATTELS GENERALLY.

Meaning of "chattels."

i.—Introductory Remarks.—In its widest sense, the expression "chattels" means all personal property, including leasehold and like interests in land which are known as chattels real, and debts and other choses in action, as well as goods capable of being transferred by actual delivery, which are often distinguished by the title "chattels personal." In a more usual and restricted sense the expression "chattels" is used to denote only the latter kind of personal property, and it is in this sense that the word is used in this present chapter.

Securities on chattels.

Chattels may be made the subject of a security for a loan or debt, either by mortgage or by pledge. A mortgage of chattels, like a mortgage of land, passes the property therein to the mortgagee, subject to redemption. The goods may, like any other mortgaged property, be retained, as is usually the case, by the mortgagor, in which case, as will be seen hereafter, the validity of the mortgage will depend on its conformity with the requirements of the Bills of Sale Acts, 1878 and 1882 (*a*). Independently of those Acts, or of the inferences to be drawn therefrom (*b*), a mortgage of chattels might have been made by assignment contemporaneous with or subsequent to delivery of the goods to the mortgagee (*c*). But it is doubtful whether, having regard to the provisions of those Acts, such transactions can be validly effected at the present day (*d*).

(*a*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43; the provisions of these Acts are considered *post*, pp. 197 *et seq.*

(*b*) See *Great Northern Rail. Co.* v. *Coal Co-operative Soc.*, (1896) 1 Ch. 187.

(*c*) The delivery may be actual or constructive. See *post*, Chap. LXIII., Sect. I. (ii).

(*d*) See this question discussed *post*, p. 200.

The Sale of Goods Act, 1893 (*e*), does not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

Mortgages of chattels where possession is retained by the mortgagor.

The question as to the validity of a mortgage of chattels, where possession of the goods is retained by the mortgagor, has generally arisen between the mortgagee and some other creditor of the mortgagor who has obtained possession of the goods by execution or otherwise subsequently to the mortgage, or between the mortgagee and the general creditors of the mortgagor, he having become bankrupt. These cases, though frequently confounded, require a distinct consideration; for it frequently happens, as will presently be seen, that mortgages which might be supported against execution creditors, notwithstanding the non-delivery of possession, are void under the enactments of the bankruptcy law.

Fraudulent mortgages of chattels.

The question, as it regards the mortgagee and any other individual creditor or creditors, turns partly upon the principles of the common law, and partly on the well-known statute 13 Eliz. c. 5. The question, as between the mortgagee and the trustee in bankruptcy of the mortgagor, acting on behalf of the creditors generally, is regulated by the provisions of the Bankruptcy Act, 1883 (*f*), which will be hereafter considered.

Fraud or secret trust.

ii.—**Mortgages fraudulent at Common Law.**—At common law, independently of any statute, a security to a creditor will be void if fraudulent, or made upon a secret trust for the debtor.

Retention of possession by mortgagor.

The retention of possession by the mortgagor after assignment is material as raising a *primâ facie* presumption that the transaction is tainted with fraud. Immediate transmutation of possession is, however, at the present day, seldom contemplated by the parties to a mortgage transaction, but the mortgagor is usually allowed to retain possession of the goods until default in payment of the mortgage moneys, or until breach of some stipulation contained in the deed.

Effect as between parties to deed, &c.

It is unnecessary that the assignment of the chattels should be followed by possession, in order to make it valid against the assignor himself, or against his creditors, who are cognisant of

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(*e*) 56 & 57 Vict. c. 71, s. 61 (4).
(*f*) 46 & 47 Vict. c. 52. See *post*, pp. 185 *et seq.*

and take part in the arrangement under which it is made, or which proceeded upon the assumption of its validity, or against strangers (*g*).

Effect as against creditors generally.

The presumption arising from retention of the goods may be rebutted, and the security may be supported as against creditors who have not assented to the transaction, by showing that the retention of possession by the mortgagor is consistent with the nature of the transaction. Such evidence may be supplied either by the express terms of the mortgage deed, or by parol evidence proving that the assignment, though in terms absolute, was really a mortgage (*h*).

Clause for possession till default.

So where a mortgage of chattels contained a clause that the mortgagor should keep possession until default in payment, or until sequestration, his possession did not show fraud, and unless fraud be proved, the mortgagee's title prevailed against an execution creditor (*i*). Nor is the mortgagee bound to take possession on the first or a subsequent default made in payment of the debt or an instalment of the debt (*k*).

The effect of such a clause is to operate as a redemise by the mortgagee, who cannot sue for the chattels until default has been made, or the expiration of the time for payment; and the mortgagor may maintain an action if his possession is interfered with in the interval. But the mortgagor is only entitled to the *use* of the chattels; if he or his trustee in bankruptcy sell them during the term, it will be a disclaimer of the tenancy, and the mortgagee or his assignees can sue for the conversion (*l*).

The proviso for the mortgagor to retain possession until default is not inconsistent with a proviso for taking possession on the happening of a certain event (*m*).

Possession consistent with deed, where no such clause.

Even when the mortgage does not contain the clause for possession by the mortgagor until default, the mortgage will be supported, if the possession is consistent with the requirements

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(*g*) *Steel* v. *Brown*, 1 Taunt. 381; *Robinson* v. *M'Donnell*, 2 B. & Ald. 134; *Beasey* v. *Windham*, 6 Q. B. 166; *White* v. *Morris*, 11 C. B. 1015. See also *Olliver* v. *King*, 8 De G. M. & G. 110.

(*h*) *Cole* v. *Davies*, 1 Ld. Raym. 724. See *Meggott* v. *Mills*, 1 Ld. Raym. 286. It must, of course, be borne in mind that all mortgages of chattels must now conform to the requirements of the Bills of Sale Acts. See *post*, pp. 197 *et seq*.

(*i*) *Martindale* v. *Booth*, 3 B. & Ad. 498; *Reed* v. *Wilmot*, 5 Moo. & P. 553; *Minshall* v. *Lloyd*, 2 M. & W. 450; *Bradley* v. *Copley*, 1 C. B. 685; *Gale* v. *Burnell*, 7 Q. B. 850; *Tapfield* v. *Hillman*, 6 Man. & Gr. 245; *Alton* v. *Harrison*, L. R. 4 Ch. 622.

(*k*) *Martindale* v. *Booth*, *sup.*; *Tapfield* v. *Hillman*, *sup.*

(*l*) *Fenn* v. *Bittlestone*, 7 Exch. 152; *Brierley* v. *Kendall*, 17 Q. B. 937.

(*m*) *Re Francis*, 10 Ch. D. 408, C. A.

and probabilities of the case (n); as where it was necessary for the mortgagor, who was an hotel-keeper, that he should remain in possession (o).

So also a security may be supported where, from the very nature of the transaction, a delivery could not be contemplated (p).

So in the case of land being mortgaged with a mill standing on it, not affixed to the freehold, in which instance the possession of the mill by the mortgagor, although a mere chattel, was held to be consistent with the deed (q).

The result of the cases seems to be, that possession of goods and chattels after an assignment of them does not of itself at common law constitute fraud as against creditors, but is only *primâ facie* evidence of it, capable, like any other evidence of a similar kind, of being rebutted or explained.

iii.—Mortgages fraudulent under Stat. 13 Eliz. c. 5.—A mortgage of chattels, though complying in all respects with the requirements of the Bills of Sale Acts, may be liable to be set aside as fraudulent against creditors under the statute 13 Eliz. c. 5.

Conveyances in fraud of creditor void.

By that statute (which will be more fully considered hereafter with reference to its bearing upon the avoidance of securities generally as against creditors on the ground of fraud (r)) it is, amongst other things, provided that every conveyance of goods and chattels made to the end, purport, and intent to delay, hinder, or defraud creditors, shall be void as against persons who may be defrauded and their representatives. But the Act is not to extend to any such conveyance made upon good consideration and *bonâ fide* to a person not having at the time of such conveyance notice of any fraud.

How far retention of possession raises presumption of fraud within the statute.

Soon after the passing of this statute, the question how far the retention of possession by a grantor of chattels was to be deemed to raise an inference of fraudulent intent to defraud creditors came before the Courts for decision, and the principles governing the application of the statute underwent much discussion in *Twyne's Case* (*s*). In that case it was decided that the retention of the possession by the grantor of chattels personal, after assignment, is *primâ facie* proof of fraud. But it is now settled that the mere circumstance of possession of chattels amounts to no more than *primâ facie* evidence of property in the person in possession (*t*).

(n) *Steward* v. *Lombe*, 1 Br. & B. 506; 4 Moo. 281; *Cook* v. *Walker*, 3 W. R. 357.

(o) *Cook* v. *Walker*, *sup.*

(p) *Bucknel* v. *Royston*, Prec. Ch. 285. And see *Lemprière* v. *Pasley*, 2 T. R. 485; *Belcher* v. *Oldfield*, 6 Bing. N. C. 102.

(q) *Steward* v. *Lombe*, 1 Br. & B. 506; *Rufford* v. *Bishop*, 5 Russ. 346, 354.

(r) See *post*, Chap. XXXI.

The tendency of modern decisions is to decide every case on a consideration of all the circumstances. If the deed being absolute, the grantor continues in possession until an execution or bankruptcy, a strong though not conclusive presumption of fraud arises (*u*); but on a conditional bill of sale, continuance in possession, when consistent with the deed, is not even *primâ facie* evidence of fraud (*x*), unless such possession is a contrivance to defeat creditors (*y*).

Distinction between sale and mortgage as regards retention of possession.

The principle in question, too, is corroborated by those in which goods and chattels had been protected against the execution creditor of a person on whom they have been settled for life, and in whose possession they were, on the ground that the enjoyment was consistent with the deed (*z*).

Effect of Bills of Sale Acts as regards retention of possession.

In connection with the question as to the avoidance of a mortgage of chattels on the ground of mere inconsistency of the mortgagor's possession with the terms of the deed, it must be borne in mind that no mortgage can now be made of chattels so as to be valid as against execution creditors, except in conformity with the statutable form (*a*), which clearly, having regard to the provisions of the Bills of Sale Acts, contemplates the retention of the chattels by the mortgagor until default.

Notoriety by registration.

Moreover, in the case of absolute assignments of chattels, the notoriety of the sale was always regarded as an important element in rebutting the presumption arising from the retention of possession (*b*). This notoriety is now necessarily inci-

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(*s*) 3 Rep. 80. See notes to *S. C.*, 1 Sm. L. C., 11th ed. p. 1. See also *Edwards* v. *Harben*, 2 T. R. 587; *Bamford* v. *Baron*, 2 T. R. 594, n.; *Manton* v. *Moore*, 7 T. R. 67; *Woodall* v. *Smith*, 1 Camp. 332; *Martindale* v. *Booth*, 3 B. & Ad. 498.

(*t*) *Lady Arundell* v. *Phipps*, 10 Ves. 139.

(*u*) *Edwards* v. *Harben*, 2 T. R. 587.

(*x*) *Pennell* v. *Dawson*, 18 C. B. 355; *Martindale* v. *Booth*, 3 B. & Ad. 498; *Hale* v. *Metropolitan Saloon Omnibus Co.*, 28 L. J. Ch. 777.

(*y*) *Nunn* v. *Wilsmore*, 8 T. R. 521.

(*z*) *Cadogan* v. *Kennett*, Cowp. 432; *Earl of Shaftesbury* v. *Russell*, 1 B. & C. 666. See also *Reed* v. *Wilmott*, 5 M. & P. 553; *Martindale* v. *Booth*, 3 B. & Ad. 498; *Riches* v. *Evans*, 9 C. & P. 640; *Carr* v. *Burdiss*, 1 C. M. & R. 782.

(*a*) See *post*, pp. 239 *et seq.*

(*b*) *Latimer* v. *Batson*, 4 B. & C. 652. See *Watkins* v. *Birch*, 4 Taunt. 823; *Jezeph* v. *Ingram*, 8 Taunt. 838; *Leonard* dent to all assignments of chattels, whether absolute or by way of mortgage, where the assignor retains possession, by virtue of the requirements of the Bills of Sale Acts rendering it essential to the validity of such instruments as against creditors that they should be duly registered so as to insure publicity (*c*).

So far as the statute of Eliz. concerns mortgages, the validity of the transaction will depend upon whether the whole circumstances of the case are such as to induce a jury to hold that the presumption of fraud, *primâ facie* to be inferred from the retention of possession by the grantor, is rebutted (*d*).

Reputed ownership.

iv.—Mortgages fraudulent in Bankruptcy—Reputed Ownership.—The law of reputed ownership has considerable effect upon mortgages of chattels.

Prior to the Bankruptcy Act, 1869 (*e*), the doctrine of reputed ownership applied to all bankrupts, and to all choses in action.

The law was by that Act confined to traders, and, so far as relates to things in action, to trade debts.

By the Bankruptcy Act, 1883 (*f*), it is enacted that—

Goods in order and disposition of bankrupt divisible among creditors.

> Sect. 44 (iii). "The property of a bankrupt divisible amongst his creditors shall comprise the following particulars (amongst others):—
>
> "All goods, being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, provided that things in action, other than debts due or growing due to him in the course of his trade or business, shall not be deemed goods and chattels within the meaning of this section."

Meaning of "goods" for purposes of the Bankruptcy Acts.

The word "goods," which is here substituted for the expression "goods and chattels," in the Act of 1869, is defined as including all chattels personal (*g*).

Fixtures.

The expression "personal chattels" is defined by the Bills of Sale Act, 1878 (*h*), to include certain specified kinds of personal property, and, amongst others, fixtures if separately

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v. *Baker*, 1 M. & S. 251; *Kidd* v. *Rawlinson*, 2 B. & P. 59; *Macdona* v. *Swiney*, 8 Ir. C. L. 73.

(*c*) See *post*, pp. 197 *et seq.*

(*d*) *Latimer* v. *Batson*, 4 B. & C. 652; *Leonard* v. *Baker*, 1 M. & S. 251; *Watkins* v. *Birch*, 4 Taunt. 823; *Dewey* v. *Baynton*, 6 East, 27; *Fortescue* v. *Barnett*, 3 My. & K. 43.

(*e*) 32 & 33 Vict. c. 71.

(*f*) 46 & 47 Vict. c. 52.

(*g*) 46 & 47 Vict. c. 52, s. 168.

(*h*) *Post*, p. 212.

assigned; but that definition is only for the purposes of the Bills of Sale Acts (*i*). Fixtures annexed to the freehold are not within the reputed ownership clause of the Bankruptcy Act, though removable by the tenant (*k*), and even trade fixtures, though annexed to the freehold since the date of a mortgage of land, will pass to the mortgagee, not to the trustee in bankruptcy (*l*). Possession of fixtures does not raise an inference of ownership (*m*), and they are consequently not within the clause, though assigned by a separate deed (*n*). But chattels which have been at one time annexed to the freehold, but which have been subsequently severed therefrom, cease upon such severance to be fixtures, and come within the clause (*o*). Chattels settled to devolve with land as heirlooms have been held not to be within the clause (*p*).

Trade utensils.

Utensils of trade or other moveables mortgaged by a bankrupt are in general within the clause (*q*).

In one case, where a deposit was made of an assignment of a lease, in which assignment trade fixtures were included, the trade fixtures were held to be within the clause (*r*).

What are chattels personal within the Bankruptcy Acts?

The expression "chattels personal" in the Bankruptcy Act appears to be used in its widest sense, so as to include personal estate of every description except chattels real and fixtures (*s*), and also except choses in action due or growing due in the course of trade or business. This expression thus includes all personal chattels within the meaning of the Bills of Sale Acts, except fixtures.

Commencement of the bankruptcy.

The commencement of the bankruptcy is defined by section 43 of the Bankruptcy Act, 1883, as the time of the act of bank-

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(*i*) *Meux* v. *Jacobs*, L. R. 7 H. L. 481.

(*k*) *Horn* v. *Baker*, 9 East, 215; *Coombs* v. *Beaumont*, 5 B. & Ad. 72; *Exp. Sykes*, 18 L. J. Bk. 200; *Hubbard* v. *Bagshaw*, 4 Sim. 326; *Clark* v. *Cronshaw*, 3 B. & Ad. 804. As to what are fixtures, so as not to be within the clause, see *Rufford* v. *Bishop*, 5 Russ. 346; and see *ante*, pp. 127 *et seq.*

(*l*) *Cullwick* v. *Swindell*, L. R. 3 Eq. 249; *Climie* v. *Wood*, L. R. 3 Ex. 257.

(*m*) *Boydell* v. *M'Michael*, 1 C. M. & R. 177.

(*n*) *Whitmore* v. *Empson*, 23 Beav. 313; *Exp. Wilson*, *Re Butterworth*, 4 D. & C. 143.

(*o*) *Ryall* v. *Rowles*, 1 Ves. Sen. 149; *Horn* v. *Baker*, 9 East, 215; *Hubbard* v. *Bagshaw*, 4 Sim. 386. See *Walmsley* v. *Milne*, 7 C. B. N. S. 121; *Cullwick* v. *Swindell*, *sup.*; *Whitmore* v. *Empson*, 23 Beav. 313.

(*p*) *Earl of Shaftesbury* v. *Russell*, 1 B. & Cr. 666.

(*q*) *Horn* v. *Baker*, *sup.*; *Lingham* v. *Biggs*, 1 B. & P. 82; *Exp. Lovering*, L. R. 9 Ch. 621; *Bryson* v. *Wylie*, 9 East, 240; *Lingard* v. *Messiter*, 1 B. & Cr. 308; *Shuttleworth* v. *Hernaman*, 1 De. G. & J. 322; *post*, p. 193.

(*r*) *Re Trethowan*, 5 Ch. D. 559, appealed from, but compromised.

(*s*) See further as to the meaning of "fixtures," *ante*, p. 125.

ruptcy on which a receiving order is made, or, if there are more than one, at the time of the first committed within three months preceding the presentation of the bankruptcy petition.

Goods acquired after bankruptcy.

Goods which come into the possession of the debtor after the commencement of the bankruptcy are, apparently, not property of the bankrupt within the 44th section, so as to be divisible among his creditors (*t*).

Possession, order, and disposition of bankrupt.

In order to support the claim of a trustee in bankruptcy as against a mortgagee of chattels, it must appear that the chattels are in the possession and order and disposition of the bankrupt under such circumstances as to enable him to obtain false credit (*u*). But the consent of the true owner must be to reputation of ownership as well as to possession, order and disposition (*x*).

Possession, &c. of partner.

The reputed ownership clause is confined to cases where the bankrupt is in sole possession as sole reputed owner, and therefore does not apply to the case of a bankrupt in joint possession of goods by himself and his partner (*y*), although his partner be a dormant partner (*z*), nor to the case of dissolution when one partner is collecting the assets (*a*); but where one partner after dissolution uses the plant and stock of the firm in his separate trade, they are in his separate order and disposition (*a*); and so where one partner purchases the assets under a decree and is allowed, before payment, to go into possession as purchaser (*b*); and also where the real owner of property allows it to be employed in the business in which another person is partner with himself; the property is in the reputed ownership of the partnership (*c*).

Where a father and son were in partnership under articles which provided that the machinery and stock in trade should belong to the father, who died, having by his will authorized his executors (the copartner and widow), to carry on the business, which they did, the machinery and stock were held

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(*t*) *Lyon* v. *Weldon*, 2 Bing. 384; *The Ruby*, 83 L. T. 438.

(*u*) *Exp. Wingfield, Re Florence*, 10 Ch. D. 594.

(*x*) *Exp. Atkin, Re Watson*, (1904) 2 K. B. 753.

(*y*) *Reynolds* v. *Bowley*, L. R. 2 Q. B. 474; *Exp. Dorman, Re Lake*, L. R. 8 Ch. 51.

(*z*) *Reynolds* v. *Bowley*, *sup.*; *Exp. Hayman*, 8 Ch. D. 12, C. A. Cf. *Colonial Bank* v. *Whinney*, 30 C. D. 261.

(*a*) *Exp. Cooper*, 1 M. D. & De G. 358. See *Exp. Sprague*, 4 De G. M. & G. 866.

(*b*) *Graham* v. *McCulloch*, L. R. 20 Eq. 397. See *Re Brewster's Assignees*, 4 De G. M. & G. 866.

(*c*) *Exp. Hayman*, 8 Ch. D. 12, C. A.

on their bankruptcy not to be in their order and disposition, but in that of the old firm (*d*).

Trustee.

An equitable mortgagee is a true owner to the extent of his interest. So, too, is a *cestui que trust* who so acts as to render the possession of the trustee the possession of a reputed owner within the meaning of the section (*e*).

Possession of wife's property by husband.

Generally speaking, the separate chattels of a wife, though in the joint possession of the husband and wife, or in the possession of the husband alone, do not fall within the clause (*f*). But of course the wife's chattels may, under certain circumstances, be held to be in the reputed ownership of the husband (*g*).

In order to exclude the operation of this clause, a real possession by the creditor, even though it be friendly, is sufficient (*h*).

Constructive possession.

The goods need not be in the actual possession of the bankrupt; it will be sufficient if they are constructively in his possession, as if they are in the possession of his servant (*i*); or, generally, of an agent for sale (*k*); or of a warehouse keeper (*l*); or of a carrier (*m*); or of a person to whom they are let on hire (*n*); or of a person to whom they are sent on sale or return, unless by special custom (*o*). But goods in the possession of a factor or agent, the relation between whom and his employer is notorious, are not in the constructive possession of the latter (*p*). Goods in the possession of a person on the hire-purchase system are generally deemed to be in the possession of that person (*q*), unless by special custom, as in the case of pianos (*r*), and furniture supplied to hotel keepers (*s*).

(*d*) *Exp. Manchester Bank*, 12 Ch. D. 917; affd. 13 Ch. D. 465.

(*e*) *Exp. Moore*, 2 M. D. & De G. 616. See *Re Mill's Trusts*, (1895) 2 Ch. 564.

(*f*) *Jarman* v. *Wolloton*, 3 T. R. 618; *Simmons* v. *Edwards*, 16 M. & W. 838; *Exp. Cox*, *Re Reed*, 1 Ch. D. 302; *Exp. Sibeth*, 14 Q. B. D. 417.

(*g*) *Kitchen* v. *Ibbetson*, L. R. 17 Eq. 46; *Re Harrison*, *Exp. Official Receiver*, 67 L. T. 600. And see 45 & 46 Vict. c. 75, s. 10.

(*h*) See *post*, p. 194.

(*i*) *Exp. Bolland*, *Re Gallehouse*, 24 L. T. 335; *Jackson* v. *Irvine*, 2 Camp. 48.

(*k*) *Exp. Roy*, *Re Sillence*, 7 Ch. D. 70.

(*l*) *Knowles* v. *Horsefall*, 5 B. & Ald. 534.

(*m*) *Hervey* v. *Liddiard*, 1 Stark. 123.

(*n*) *Hornsby* v. *Miller*, 1 E. & E. 192.

(*o*) *Exp. Wingfield*, *Re Florence*, 10 Ch. D. 591, C. A.; *Re Button*, *Exp. Haviside*, (1907) 2 K. B. 180, C. A.

(*p*) *Re Fawcus*, *Exp. Buck*, 3 Ch. D. 795; *Exp. Bright*, *Re Smith*, 10 Ch. D. 566.

(*q*) See *Exp. Brooks*, *Re Fowler*, 23 Ch. D. 261, C. A.

(*r*) *Exp. Hattersley*, *Re Blanshard*, 8 Ch. D. 601.

(*s*) *Crawcour* v. *Salter*, 18 Ch. D. 30, C. A. See *Exp. Powell*, *Re Matthews*, 1 Ch. D. 501; *Exp. Turquand*, *Re Parker*, 14 Q. B. D. 636, C. A.

As a rule the possession of a mortgagee or pledgee or bailee having a lien, is his own, and not the constructive possession of the mortgagor, pledgor or bailor (*t*). But this is not so where the mortgagor retains the power of disposal (*u*) or where the pledge is wrongful as against the true owner (*x*).

Possession by custom of locality or trade.

The reputed ownership clause does not apply where the possession is in accordance with the custom of the locality or of the trade, as of articles of machinery which by custom are let with the mill (*y*); and a practice in the factory districts is referred to of inserting advertisements, stating the machinery to be the property of the lessor, and let by him for a term only (*z*).

And the clause does not apply to barges bearing the debtor's (*a*) name and so registered, there being a custom in the coal trade for coal merchants to hire barges, and paint their own name thereon (*b*); nor to books deposited with a bookseller to sell on commission, such a custom being notorious (*c*); nor to horses let to brewers (*d*). A custom of letting cabs by cab proprietors upon a deferred payment system was held not to be proved (*e*).

Similarly, a custom of leaving goods sold in vendor's possession for convenience of vendee, takes the case out of the statute (*f*).

But a custom, in order to take a case out of the order and disposition clause, must be clearly proved (*g*), either by reported cases, or as a question of fact (*h*); and must be one which the ordinary creditors may be reasonably presumed to have known (*h*). It must be known generally; a custom prevalent in a particular market will not affect creditors not dealing therein (*i*).

A custom in certain localities to stack the sold produce of a

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(*t*) *Lincoln Waggon Co.* v. *Mumford*, 41 L. T. 655.

(*u*) *Colonial Bank* v. *Whinney*, 11 App. Ca. 438, 445.

(*x*) *Exp. Roy, Re Sillence*, 7 Ch. D. 70.

(*y*) *Horn* v. *Baker*, 9 East. 215; *Storer* v. *Hunter*, 3 B. & Cr. 368; *Watson* v. *Peache*, 1 Bing. N. C. 327.

(*z*) 2 Dav. Conv. 3rd ed. p. 710; 4th ed. p. 162.

(*a*) *Kirkley* v. *Hodgson*, 1 B. & Cr. 588.

(*b*) *Watson* v. *Peache*, 1 Bing N. C. 327.

(*c*) *Whitfield* v. *Brand*, 16 M. & W. 282; *Exp. Greenwood*, 6 L. T. N. S. 558.

(*d*) *Exp. Elmer*, 13 W. R. 476; *Exp. Watkins*, L. R. 8 Ch. 523, n.

(*e*) *Re Hill*, 1 Ch. D. 503, n., C. A.

(*f*) *Priestley* v. *Pratt*, L. R. 2 Ex. 101; *Exp. Vaux*, L. R. 9 Ch. 602.

(*g*) *Re Hill*, 1 Ch. D. 503, n., C. A.

(*h*) *Exp. Powell, Re Matthews*, 1 Ch. D. 501; *Exp. Wingfield*, 10 Ch. D. 501, C. A.

(*i*) *Re Goetz, Jonas & Co.*, (1898) 1 Q. B. 787.

farm apart from the unsold produce, was successfully insisted on (*k*). On the other hand, proof of a custom to let old collieries furnished and virgin collieries unfurnished, is fatal to the claim of a lessor to the furniture of a virgin colliery (*l*).

So, goods in the hands of malting agents are not in their order and disposition, as they are not usually the owners of the barley and malt on their malting (*m*).

Unfinished chattel.

So, also, the reputed ownership clause does not apply where an unfinished chattel, as, for instance, a ship in a builder's yard which has been mortgaged or sold, is left in the assignor's possession for a reasonable time for completion (*n*).

Possession by sheriff.

When the sheriff has taken possession of goods, they are no longer in the order and disposition of the debtor, at all events, if the seizure by the sheriff is rightful (*o*).

But where goods were taken in execution, and assigned by the sheriff and debtor to the creditor, who put his initials on every article and demised them to the debtor at a certain rent, who remained in possession to the time of his bankruptcy, it was held that the debtor was the *reputed owner*, there not being a notorious change of ownership (*p*).

Other cases of possession.

The following cases have been held not to fall within the clause:—goods in possession of a receiver appointed at the instance of a creditor (*q*); goods distrained for rent, but not sold (*r*); goods in the possession of a factor or agent (*s*), if the relation is notorious (*t*). So, the clause does not apply when the goods are in the possession of the true owner, subject to a lien by agreement (*u*); nor when the possession, as of a lessee, is with the consent of the mortgagor, who is permitted

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(*k*) *Re Terry*, 11 W. R. 113.

(*l*) *Coombs* v. *Beaumont*, 5 B. & Ad. 72.

(*m*) *Harris* v. *Truman*, 7 Q. B. D. 341, affd. 9 Q. B. D. 264, C. A.

(*n*) *Woods* v. *Russell*, 5 B. & Ald. 942; *Clarke* v. *Spence*, 4 A. & E. 448; *Holderness* v. *Rankin*, 2 De G. F. & J. 258; *Swainston* v. *Clay*, 4 Giff. 187; varied, 3 De G. J. & S. 558.

(*o*) *Fletcher* v. *Manning*, 12 M. & W. 571. And cf. *Exp. Foss*, *Re Baldwin*, 2 De G. & J. 230; and *Exp. Edey*, *Re Cuthbertson*, L. R. 19 Eq. 264. See also *Meggy* v. *Imperial Discount Co.*, 3 Q. B. D. at p. 714.

(*p*) *Lingard* v. *Messiter*, 1 B. & Cr. 308; *Exp. Lovering*, *Re Jones*, L. R. 9 Ch. 621; *Exp. Brooks*, *Re Fowles*, 23 Ch. D. 261, C. A.

(*q*) *Taylor* v. *Eckersley*, 5 Ch. D. 740.

(*r*) *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335, C. A.; *Lehain* v. *Philpott*, L. R. 10 Ex. 242; *Sacker* v. *Chidley*, 11 Jur. N. S. 654.

(*s*) *Ryall* v. *Rowles*, 1 Ves. Sen. 349; 1 Atk. 165; *Mace* v. *Cadell*, Cowp. 232; *Whitfield* v. *Brand*, 16 M. & W. 282. And see *Exp. Bright*, 10 Ch. D. 566, C. A.; *Re Kulberg*, 12 W. R. 137. But see *Exp. Roy*, 7 Ch. D. 70.

(*t*) *Re Fawcus*, 3 Ch. D. 785.

(*u*) *Hawthorn* v. *Newcastle Rail. Co.*, 3 Q. B. 734.

by the true owner (the mortgagee) to retain possession (*x*); nor when the person in whose possession the chattels were by the consent of the true owner pledges them, and they are in the possession of the pawnee at the time of the pawner's bankruptcy (*y*).

Where the mortgage was taken in the name of a trustee whose name was over the stores, and the bankrupt served behind the bar, there was no reputed ownership (*z*).

Possession in "trade or business."

In order that goods may fall within the reputed ownership clause they must be in the possession, &c. of the bankrupt in his trade or business. The expression "business" has a more extensive signification than "trade," and will include farming, banking, and other occupations which are not strictly trades (*a*).

The business must, in order to be within the section, be carried on with a view to profit (*b*).

Articles not in their nature necessarily connected with the particular business of the trader require clear evidence to prove the reputed ownership (*c*).

Possession by "consent of true owner."

In order that goods not belonging to a bankrupt should pass to his trustee, they must have been at the commencement of the bankruptcy in the possession, &c. of the bankrupt by consent of the true owner. These words are not mere formal words (*d*), but mean that there must have been either actual consent, or acquiescence amounting thereto, whether intentional or arising from some impropriety or laches on the part of the true owner (*e*).

It is essential that the true owner should have consented to a state of things from which he must have known, if he considered the matter, that the inference of ownership by the bankrupt must (not might) arise (*f*).

Meaning of "true owner."

The interest of the true owner may be legal or equitable. So where a mortgagor is, by the mortgage deed, entitled to remain in possession till demand, he is in possession with the

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(*x*) *Fraser* v. *Swansea Canal Navigation Co.*, 1 A. & E. 354.

(*y*) *Greening* v. *Clark*, 4 B. & Cr. 316.

(*z*) *Edmunds* v. *Best*, 7 L. T. N. S. 279. See *Shrubsole* v. *Sussams*, 16 C. B. N. S. 452.

(*a*) *Harris* v. *Amery*, L. R. 1 C. P. 148, at p. 154. See *Re Jenkinson*, 15 Q. B. D. 441.

(*b*) *Re Wallis, Exp. Sully*, 14 Q. B. D. 951.

(*c*) *Exp. Lovering, Re Murrell*, 24 Ch. D. 21 C. A.

(*d*) *Smith* v. *Topping*, 5 B. & Ad. 674, 678.

(*e*) *Joy* v. *Campbell*, 1 Sch. & L. 328; *Hamilton* v. *Bell*, 10 Exch. 545, 549, 552; *Exp. Geaves*, 8 De G. M. & G. 291; *Re Bankhead's Tr.*, 2 K. & J. 560; *Exp. Bell*, 17 L. J. Bky. 9.

(*f*) *Re Watson, Exp. Atkin*, (1904) 2 K. B. 753, C. A.

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consent of the true owner, the mortgagee (*g*). In some cases, it seems to have been considered that where the mortgagee has covenanted to allow the mortgagor to remain in possession, the section does not apply, but these decisions cannot now be relied on (*h*).

It is true, that where there is a mortgage of chattels, with a proviso for quiet enjoyment by the mortgagor till default, or where the mortgagor takes, under the mortgage deed, an interest in the chattels, determinable upon his default in payment or by notice from the mortgagee, the mortgagor is, in a sense, the true owner, and the mortgagee cannot, until the term or interest of the mortgagor is determined, bring trover (*i*); and if the mortgagee seizes the chattels without due notice of payment, the mortgagor can bring trespass against him (*k*). But under a proviso or term of this kind, the mortgagor has been held not to be the "true owner" within the reputed ownership clause, on the ground that such interest of the bankrupt was really illusory, and substantially, if not technically, permissive; that the law will not allow a mortgagor of chattels to stay in possession and so evade the rule; and that where the mortgagee can enter into possession by giving a short notice, or (as it was put by Mr. Justice Willes) where the mortgagee consents to put himself in a position in which he has no immediate right to the possession of the goods, they are, in reality, in the possession of the mortgagor with the consent of the true owner (*l*). So far as his general creditors are concerned, the mortgagor in such a case has the reputation of absolute ownership, though, as between himself and the mortgagee, he has a real, though limited, interest. Of course where the mortgagor has not even such interest, but merely a licence to use the chattels mortgaged, the reputed ownership clause clearly applies (*m*).

So where a person in possession of chattels of which he has executed a bill of sale is subsequently adjudicated bankrupt before making any default in payment of the sum thereby secured, such chattels are deemed to be in the order and

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(*g*) *Exp. Harding*, L. R. 15 Eq. 223; *Exp. Union Bk. of Manchester, Re Jackson*, L. R. 12 Eq. 354.

(*h*) *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510; *Exp. Homan*, L. R. 12 Eq. 598.

(*i*) *Fenn* v. *Bittlestone*, 7 Exch. 152.

(*k*) *Brierley* v. *Kendall*, 17 Q. B. 937.

(*l*) *Spackman* v. *Miller*, 12 C. B. N. S. 659; *Re Ginger*, *inf.*

(*m*) *Freshney* v. *Carrick*, 1 H. & N. 653; *Hornsby* v. *Miller*, 1 E. & E. 192.

disposition of the bankrupt within the reputed ownership clause (*n*).

When the mortgagee contracted to sell at the date of the bankruptcy, the possession of the mortgagor brought the case within the clause (*o*).

Builder's contract.

Materials which an owner of land may seize under a builder's contract are not in the order and disposition of the builder with the consent of the true owner, for, until seizure, the landowner is not the true owner of the goods, and, independently of the Bills of Sale Acts, the right of the trustee in the builder's bankruptcy would be subject to the right to seize under the building agreement (*p*). But such a power, unless carefully framed, may bring the contract within the mischief of those Acts (*q*).

Consent of true owner.

There must be consent of the true owner, and whether there is such consent is a question of fact to be determined in each case. It is essential that the true owner should have consented to a state of things from which he must have known that the inference of ownership must arise (*r*).

Termination of consent.

If the consent is withdrawn before the bankruptcy, although possession is not actually taken, the clause does not apply. Instructions to take possession of the whole, followed by actual possession of part, is a sufficient withdrawal of consent (*s*), and also sending a broker to take possession, although he could not get into the house (*t*); and where a demand of possession is made by the creditor to the person in possession of the goods without notice of an act of bankruptcy, the clause does not apply (*u*); an express demand, however, is not necessary (*x*), but a mere intention to resume possession is not sufficient (*y*).

In order to take book debts out of the order and disposition

(*n*) *Re Ginger*, (1897) 2 Q. B. 461; *Re Hayes*, (1899) 2 Ir. R. 206.

(*o*) *Barnes* v. *Pinkney*, 36 L. J. Ch. 815.

(*p*) *Exp. Newitt, Re Garrud*, 16 Ch. D. 522, C. A. See *Re Weibking, Exp. Ward*, (1902) 1 K. B. 713; *Re Keen, Exp. Bristol Sch. Bd.*, (1902) 1 K. B. 555; *Hart* v. *Porthgain*, (1903) 1 Ch. 690.

(*q*) *Climpson* v. *Coles*, 23 Q. B. D. 465, *post*, p. 207.

(*r*) *Re Watson*, *ante*, p. 191.

(*s*) *Re Eslick*, 4 Ch. D. 496.

(*t*) *Exp. Harris*, *Re Pulling*, L. R. 8 Ch. 48.

(*u*) *Exp. Ward*, L. R. 8 Ch. 148; *Exp. Montagu*, 1 Ch. D. 554, C. A.

(*x*) *Re Eslick*, *Exp. Phillips*, 4 Ch. D. 496.

(*y*) *Brewin* v. *Short*, 24 L. J. Q. B. 297.

of an assignor, the mortgagee must give notice to the debtor, and take every possible step to obtain possession of the debts (*z*).

Entry and sale before the bankruptcy take the case out of the statute (*a*); and possession taken of stock in business is sufficient to carry furniture in the house (*b*).

Where possession is taken between the presentation of a liquidation petition and the order, the goods are protected (*c*).

The sheriff's wrongful possession is still the possession of the mortgagor (*d*); *secus*, if the goods are rightfully in hands of the sheriff (*e*).

The true owner taking back the goods without notice of an act of bankruptcy takes the case out of the statute (*f*).

In order to exclude the operation of the reputed ownership clause, it is sufficient if a mortgagee takes real possession of the mortgaged goods with the intention of asserting his rights, even though such possession is friendly, and without depriving the mortgagor of the user of the goods (*g*).

Meaning of "reputed ownership."

The last condition necessary under the section to cause goods not belonging to a bankrupt to pass to his trustee is, that they should be in the possession, &c. of the bankrupt "under such circumstances that he is the reputed owner thereof." Whether there is a reputed ownership with the consent of the true owner, such as to bring goods within the section, is a matter of fact to be determined on the evidence in the particular case (*h*).

Upon the same principle of reputed ownership, where an undischarged bankrupt is allowed by his trustee to trade, the assets, upon a second bankruptcy, belong to the trustee under the latter (*i*). There must, however, be knowledge and consent on the part of the trustee (*k*); mere *laches*, not amounting to fraud, will not do. It is no part of the duty of the trustee or creditors to look after the debtor (*l*).

Securities given to the subsequent creditors of such bankrupt

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(*z*) *Rutter* v. *Everett*, (1895) 2 Ch. 872.

(*a*) *Graham* v. *Webb*, 3 F. & F. 239.

(*b*) *Re Eslick*, 4 Ch. D. 496.

(*c*) *Re Wright*, *Exp. Arnold*, 3 Ch. D. 70, C. A.

(*d*) *Exp. Edey*, L. R. 19 Eq. 264.

(*e*) *Re Baldwin*, 2 De G. & J. 230; *Taylor* v. *Eckersley*, 5 Ch. D. 740.

(*f*) *Graham* v. *Furber*, 14 C. B. 134.

(*g*) *Exp. National Guardian Assurance Co.*, *Re Francis*, 10 Ch. D. 408, C. A.

(*h*) *Horn* v. *Baker*, 9 East, 215; 2 Sm. L. C. 255 (9th ed.).

(*i*) *Troughton* v. *Gitley*, Amb. 630; *Exp. Ford*, 1 Ch. D. 521, C. A.; *Engelback* v. *Nixon*, L. R. 10 C. P. 645; *Meggy* v. *Imperial Discount Co.*, 3 Q. B. D. 711.

(*k*) *Re Clarke*, *Exp. Beardmore*, (1894) 2 Q. B. 393.

(*l*) *Exp. Ford*, *sup.*

with or without notice of the bankruptcy are binding upon the trustee (*m*).

The proposition that all dealings by a bankrupt in respect of after-acquired property with *boná fide* assignees for value are valid against the trustee who has not intervened extends to leaseholds, but not to freeholds (*n*).

Choses in action.

The above section as to reputed ownership (*o*) expressly excludes things in action except trade or business debts.

With regard to equitable choses in action a trustee in bankruptcy is in no better position than any other assignee, and accordingly he must, in order to perfect his title, give notice or obtain a stop order in order to obtain priority over a subsequent assignee from the bankrupt (*p*). Otherwise he will be postponed to such an assignee who has given notice or obtained a stop order (*q*).

But the trustee takes subject to existing equities, and consequently he will not get priority over an equitable mortgagee for value who has become such before the bankruptcy by giving notice first (*r*). The rule, however, does not apply to the case of unpaid purchase-money of real estate (*s*).

Until the trustee intervenes a party dealing *boná fide* and for value may take an assignment of a chose in action even with notice of the bankruptcy (*t*).

The doctrine of reputed ownership has here been considered only with reference to its bearing on the operation and efficacy of mortgages or bills of sale of chattels; the subject will be found more fully discussed in several treatises on bankruptcy law.

Validity of bill of sale as against trustee.

The question as to the efficacy of a duly made and registered bill of sale given by way of security as against the trustee in bankruptcy of the grantor will be considered in a subsequent section of this chapter (*u*).

(*m*) *Re Cazneau's Legacy*, 2 K. & J. 249; *Cohen* v. *Mitchell*, 25 Q. B. D. 262, C. A.

(*n*) *Re Clayton and Barclay*, (1895) 2 Ch. 212; *post*, Chap. XX. Sect. V.

(*o*) *Ante*, p. 185.

(*p*) *Mercer* v. *Vans Colina*, 67 L. J. Q. B. 424; *Re Beall*, (1899) 1 Q. B. 688.

(*q*) *Stuart* v. *Cockerell*, L. R. 8 Eq. 607; *Re Russell's Trusts*, L. R. 15 Eq. 26; *Palmer* v. *Locke*, 18 Ch. D. 381.

(*r*) *Re Wallis, Exp. Jenks*, (1902) 1 K. B. 719.

(*s*) *Exp. Rabbidge, Re Pooley*, 8 Ch. D. 367.

(*t*) *Re Bennett*, (1907) 1 K. B. 149.

(*u*) *Post*, pp. 197 *et seq.*

Chap. XIV. § 1 (v.)

v.—Rights of Mortgagor and Mortgagee of Chattels.—Independently of the Bills of Sale Acts, the following points have been decided as to the rights of parties under mortgages of goods and chattels:—

Insurance.

A mortgagee of chattels personal, which have been insured by the mortgagor and been destroyed by fire, cannot, on action brought to restrain the payment of the insurance moneys to the mortgagor, &c., obtain an order for payment of money into Court without serving the trustees in bankruptcy of the mortgagor with notice (*x*).

Trover for mortgaged chattels.

Where goods and chattels are assigned by way of mortgage, the mortgagor having the right to possession of the mortgaged chattels can alone maintain trover for the goods until default, when the estate of the mortgagee, being freed from the condition, becomes absolute, so that he can maintain trover for the goods (*y*).

If the goods are in the meanwhile taken by a third person, as an execution creditor, the mortgagee is then unable to require possession (*z*).

Right to possession.

The right of the mortgagee to possession is not affected by his having received a bill of exchange on account of the debt, and indorsed it over for value (*a*).

But if the mortgagor in possession under the proviso until default sells the goods, this act determines his possession, and the mortgagee can recover at once against the purchaser (*b*).

Where the mortgagor had, before the mortgage, bailed the goods, the mortgagee can recover them from the bailee (*c*).

The effect of these statutes is, that although a mortgage of chattels personal made *bonâ fide*, and for a valuable consideration, but the possession of which is retained by the assignor, will be valid against creditors at common law, and under 13 Eliz. c. 5, if it can be shown that the possession is consistent with the nature of the transaction, so that the presumption of fraud raised by the possession is rebutted, yet it may be void

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(*x*) *Marriage* v. *Royal Exchange Assurance Co.*, 18 L. J. Ch. 216. *Nota*, the mortgagee was also equitable mortgagee of leasehold premises on which the chattels were.

(*y*) *Bradley* v. *Copley*, 1 C. B. 685.

(*z*) *Wheeler* v. *Montefiore*, 2 Q. B. 133. See *White* v. *Morris*, 11 C. B. 1015.

(*a*) *Bramwell* v. *Eglinton*, 5 B. & S. 39.

(*b*) *Loeschman* v. *Machin*, 2 Stark. 311; *Cooper* v. *Willomatt*, 1 C. B. 672; *Payne* v. *Fern*, 6 Q. B. D. 620.

(*c*) *European, &c. Co.* v. *Royal Mail, &c. Co.*, 8 Jur. N. S. 136, Q. B.

under the statutes of bankruptcy, as against the trustees of a bankrupt, who continues the reputed owner, unless it can be shown that possession has been given as far as circumstances would permit.

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SECTION II.

BILLS OF SALE ACTS.

Policy of the Bills of Sale Acts.

i.—Introductory Remarks.—Mortgage deeds of chattels are now generally governed by the Bills of Sale Acts, 1878 (*d*) and 1882(*e*), as amended by the Acts of 1890(*f*) and 1891(*g*). The objects of these Acts have been (1) to protect creditors, and (2) persons whose necessities compel them to give bills of sale. How far the latter object of the Legislature is sound in policy, or has hitherto been satisfactorily effectuated, it would not be pertinent to the scope of this treatise to discuss, but one undeniable result of the Acts has been to produce a vast amount of expensive litigation, and of decisions not always easily reconcilable on any consistent ground of principle or with each other (*h*).

Bills of Sale Acts, 1854 and 1866.

In 1854, for the better protection of purchasers and mortgagees, the Bills of Sale Act of that year (*i*) was passed, which by sect. 1 thereof provided that every bill of sale of personal chattels, whether absolute or conditional, should be void as against assignees, creditors, &c. of the grantor, unless the same or a copy thereof should be filed within twenty-one days in manner therein prescribed; the bill was to be accompanied by an affidavit which was to be filed simultaneously with the bill(*i*). This Act was amended by the Bills of Sale Act, 1866 (*k*).

Bills of Sale Act, 1878.

Both these Acts were repealed (except as regards existing bills of sale) by the Bills of Sale Act, 1878 (*l*), which was made applicable to every bill of sale executed on and after the 1st of January, 1879.

(*d*) 41 & 42 Vict. c. 31.

(*e*) 45 & 46 Vict. c. 43.

(*f*) 53 & 54 Vict. c. 53.

(*g*) 54 & 55 Vict. c. 35.

(*h*) See *Exp. Collins, Re Yarrow*, 38 W. R. 175.

(*i*) 17 & 18 Vict. c. 36. See *Grindell* v. *Brendon*, 6 C. B. N. S. 698; *Mason* v. *Wood*, 1 C. P. D. 67.

(*k*) 29 & 30 Vict. c. 96.

(*l*) 41 & 42 Vict. c. 31, s. 23.

The language of the Act of 1878 is, in many respects, identical with the repealed Act of 1854; and accordingly the cases decided under the earlier Act are, for the most part, applicable under the Act of 1878. Attention will be called to the material alterations effected by the Act of 1878 as its provisions come under notice.

Bills of Sale Act, 1882.

In 1882, the Bills of Sale Act (1878) Amendment Act, 1882 (*m*), was passed, and is to be construed as one with the Act of 1878, but does not apply to any bill of sale duly registered before the commencement of the Act of 1882, so long as the registration thereof is not avoided by non-renewal or otherwise. This Act applies only to bills of sale given by way of security for payment of money (*n*).

Bills of Sale Acts, 1890 and 1891.

Two further amending Acts have been since passed, namely, the Bills of Sale Act, 1890 (*o*), which excepts letters of hypothecation of imported goods from the operation of sect. 9 of the Act of 1882; and the Bills of Sale Act, 1891 (*p*), which altogether exempts from the operation of the Acts of 1878 and 1882 certain securities on imported goods.

Application of Acts.

The English Acts do not apply to Ireland or Scotland (*q*).

ii.—What Instruments are "Bills of Sale" within the Acts. —The expression "bill of sale" is thus defined in sect. 4 of the Act of 1878:—

Interpretation of term "bill of sale."

> "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred."

By sect. 3 of the Act of 1882, the expression "bill of sale" has the same meaning as in the Act of 1878, except as to bills of sale, or other documents mentioned in sect. 4 thereof, given

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(*m*) 45 & 46 Vict. c. 43.

(*n*) *Ibid.* s. 3.

(*o*) 53 & 54 Vict. c. 53.

(*p*) 54 & 55 Vict. c. 35.

(*q*) Act of 1878, s. 24; Act of 1882, s. 18. The Irish Acts are 42 & 43 Vict. c. 50, and 46 Vict. c. 7.

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otherwise than by way of security for the payment of money to which the Act of 1882 does not apply.

This definition is only for the purposes of the Bills of Sale Acts (*r*); and, so far as relates to all absolute bills of sale, and also to bills of sale by way of security for money, made or given before the commencement of the Act of 1882 (*s*), the definition must be read in connection with sect. 3 of the Act of 1878, which provides that such Acts shall apply to all bills of sale "whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale" (*t*). The effect of this enactment would appear to be to exclude any mortgages of chattels, made or given before the commencement of the Act of 1882, and now subsisting by virtue of renewals (*u*), where possession of the goods is delivered prior to or contemporaneously with the execution of the mortgage deed, from the operation of the Act of 1878, by which alone such bills are regulated.

But as regards instruments falling within the definition of sect. 4 of the Act of 1878, and made or given by way of security for money on or after the 1st November, 1882, a question arises which, though perhaps not likely to be of frequent occurrence, is nevertheless of some importance, namely, whether delivery of the goods anterior to, or contemporaneous with, the execution of the instrument, will exclude the operation of the Acts.

It has repeatedly been held (*x*) that where goods are pledged or deposited by way of security for money, an instrument in writing accompanying the pledge or deposit and merely regulating the rights of parties with regard to the possession of the goods, but neither giving any authority to take such possession, nor transferring any property therein, are not within the mischief of either the Act of 1878 or the Act of 1882. But there appears to be no reported decision on the point whether a mortgage of chattels already delivered purporting to transfer the property therein, and so to convert what otherwise might be merely a pledge or deposit into a legal mortgage conferring a right to foreclosure, falls within the operation of the Acts so as

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(*r*) See *Meux* v. *Jacobs*, L. R. 7 H. L. 471.

(*s*) 1st November, 1882.

(*t*) See *Re Hall, Exp. Close*, 14 Q. B. D. 386, 392.

(*u*) See *post*, p. 211.

(*x*) See *inf*. p. 264.

to require to be registered, and to be void unless made in conformity with the statutable form prescribed by the Act of 1882, which is obviously not applicable to transactions of this nature.

In one of the cases (*y*) above referred to, in which it was decided that a memorandum accompanying a pledge was not within the Act of 1882, Sir C. Bowen, L.J., said he considered it clear that a document of this kind, which is not intended to transfer the property in goods, or to give any right to possession of them, is not within either of the Bills of Sale Acts, and is not struck at by either of them; and he pointed out, with reference to the question then before the Court, it was not necessary to determine what was the bearing of sect. 3 of the Act of 1878 or sect. 4 of the same Act, and that if it were, he could wish to take further time for consideration (*z*). But Sir E. Fry, L.J., in the same case, said that it appeared to him that the effect of sect. 9 of the Act of 1882 is to make void every document which is included in sect. 4 of the Act of 1878 which does not in substance comply with the statutory form; and he stated his then present impression to be that sect. 4 is not modified by sect. 3 (*a*).

The question under consideration accordingly depends upon whether sect. 3 of the Act of 1878, which admittedly limits and controls the definition given by sect. 4 in cases falling only within that Act, also limits and controls such definition in cases falling under the Act of 1882. On this point, though there is no express decision, it is apparently to be inferred from the dicta above referred to, that, if the question were to come before the Courts, it would be so decided as to declare that any mortgage made after, or contemporaneously with, delivery of the chattels comprised therein, would be void as regards such chattels, as being incapable of being made according to the statutable form.

Parol mortgage of chattels.

Mortgages of, or charges on chattels may, however, be effected without deed or other writing, and the conditions under which the goods are delivered or retained may be proved by parol evidence (*b*). A mortgage of chattels unaccompanied by any writing, but completed by actual delivery, will not be affected

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(*y*) *Exp. Hubbard, Re Hardwick*, 17 Q. B. D. 690, C. A.

(*z*) *Ibid.* at p. 699.

(*a*) *Ibid.* at p. 701. And see *Great Northern Rail. Co.* v. *Coal Co-operative Soc.*, (1896) 1 Ch. 187 at pp. 192, 193.

(*b*) Lit. s. 365; *Reeves* v. *Capper*, 5 Bing. N. C. 136; *Flory* v. *Denny*, 7 Exch. 581.

by the Bills of Sale Acts (*c*), but will be valid not only as against execution creditors, but also as against the trustee in bankruptcy of the mortgagor, unless the latter has, previously to the delivery, committed an act of bankruptcy upon which subsequent proceedings in bankruptcy are founded.

The Acts relate only to documents, and not to transactions which may be effected without any writing (*d*). And, accordingly, a parol charge, without delivery of possession to the lender, would be valid at common law, if made in good faith, but the retention of possession by the borrower would be a strong presumption of an attempt to defraud creditors, and the goods would, of course, be in the order and disposition of the borrower so as to pass to his trustee in bankruptcy.

A document which does not express the real agreement between the parties will not necessarily prevent the setting up a title under an independent oral agreement (*e*), the test being whether it is necessary to put the document in evidence to prove the transaction (*f*).

Meaning of expressions used in the definition.

The meaning of the several expressions used in the above definition of a bill of sale will be now considered.

"Bill of sale."

A "bill of sale," for the purposes of these Acts, has been defined as an instrument "on which the title of the transferee depends, either as an actual transfer of the property, or an agreement to transfer, or as a muniment or document of title taken at the time as a record of the transaction" (*g*).

"Assignments and transfers."

The words "assignment" and "transfer" seem equally to mean a document, which, though not in form a bill of sale, assumes to transfer the property in goods in the same way in which a bill of sale would do so (*h*). These expressions do not include assignments and transfers of existing bills of sale (*i*).

"Declarations of trust."

Declarations of trusts of chattels may be made by parol (*k*), but if the terms of the trust are reduced to writing without

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(*c*) *Woodgate* v. *Godfrey*, 5 Ex. D. 24, C. A.

(*d*) *Woodgate* v. *Godfrey*, *sup.* See *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, 35 Ch. D. at p. 203, affd. 13 App. Ca. 554.

(*e*) *Newlove* v. *Shrewsbury*, 21 Q. B. D. 41.

(*f*) *Haydon* v. *Brown*, 59 L. T. 810.

(*g*) *Marsden* v. *Meadows*, 7 Q. B. D. 80, C. A. See *Horsfall* v. *Key*, 2 Exch. 778; *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *North Central Wagon Co.*, 13 App. Ca. 554.

(*h*) Per Lord Esher, M.R., in *Exp. Hubbard*, *Re Hardwick*, 17 Q. B. D. 690, C. A. See *Re Roberts*, *Evans* v. *Roberts*, 36 Ch. D. 196 (entry in auctioneer's book).

(*i*) See Act of 1878, s. 10 (3).

(*k*) *Peckham* v. *Taylor*, 31 Beav. 254.

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delivery of the goods, the instrument will be a bill of sale within the meaning of the Acts; and, therefore, if the trusts are by way of security for money, the instrument will be void as being incapable of being framed in accordance with the statutable form prescribed by the Act of 1882 (*l*); unless the document is not intended to operate, and does not operate, until the goods are actually delivered (*m*).

Where a letter purporting to transfer coals on a debtor's wharf, and undertaking to hand over the proceeds thereof to the creditor, was duly registered as a bill of sale under the Act of 1854, it was held that this was a valid declaration of trusts of the proceeds within the meaning of that Act, and that the title of the creditor on taking possession of the goods prevailed against the trustee in the debtor's liquidation (*n*).

So also a hypothecation note, given on an advance by bankers, undertaking to hold goods for the bankers and to hand to them, out of the proceeds thereof, the amount of the loan, was held to be a declaration of trust without transfer, and, consequently, a bill of sale within the meaning of the same Act (*o*).

"Receipt" and "inventory."

Under the Act of 1854, it was held that the bill of sale, whatever its form, must be an instrument by which a title to the goods is acquired; the term, therefore, did not include a receipt for purchase-money, though it referred to an inventory of the goods (*p*).

As regards absolute assignments, the rule has been laid down that, under the Act of 1878, if a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then, even if the document be only a simple receipt for the purchase-money, it will be a bill of sale; but not so if the bargain is complete without the document so that the property passes independently of it (*q*), or, in other words, the document, in order to fall within the mischief of the Acts, must amount to an assurance of personal chattels at law or in equity (*r*).

(*l*) See sect. 9 of that Act and schedule.

(*m*) *Charlesworth* v. *Mills*, (1892) A. C. 231.

(*n*) *Exp. Montagu, Re O'Brien*, 1 Ch. D. 554, C. A.

(*o*) *Reg.* v. *Townshend*, 15 Cox, C. C. 466.

(*p*) *Allsopp* v. *Day*, 7 H. & N. 457; *Thomson* v. *Barrett*, 1 L. T. N. S. 268; *Hale* v. *Metropolitan Saloon, &c. Co.*, 28 L. J. Ch. 777; *Gough* v. *Everard*, 2 H. & C. 1; *Woodgate* v. *Godfrey*, 4 Ex. D. 59, 5 Ex. D. 24.

(*q*) *Ramsay* v. *Margrett*, (1894) 2 Q. B. 18, 23, C. A.

(*r*) *Marsden* v. *Meadows*, 7 Q. B. D. 80, C. A. See *North Central Wagon*

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The earlier decisions referred to were held not to be applicable where the transaction was really a security (*s*); and, if it appear that this is the true nature of the transaction, it is clear that, under the present Acts, an inventory or receipt given in connection therewith is a document by virtue of which alone the property in the goods passes to the mortgagee, and is, consequently, a "bill of sale" within the definition, and being a bill of sale by way of security, it will be void as not being in accordance with the statutable form.

If an inventory and receipt for the money are given by separate documents operating independently, the inventory will not be a bill of sale, there being no inventory with receipt attached within the meaning of sect. 4 of the Act of 1878 (*t*). But, of course, such independent receipt, if the mortgagee's title to the property depends thereon, will be a bill of sale, and void accordingly.

Where goods were actually delivered as security for an advance, together with a receipt for the sum advanced signed by the borrower, it was held that the receipt, not being an assurance, was not a bill of sale (*u*).

So where the property in the goods passed by delivery, it was held that the inventory with receipt attached was not an assurance of the goods, but a mere record of the sale, which did not require to be registered (*x*).

A receipt with an inventory given by a sheriff's officer was held not to be a bill of sale under this section, though the purchaser allows the debtor to remain in possession (*y*). But the question must be determined on the facts of each case (*z*).

"Other assurances."

The words, "other assurances of personal chattels," occur in the Act of 1854 as well as in the Act of 1878, and are doubtless intended to include all documents of a like nature with, but not strictly falling within the description of the several instruments mentioned before; but the words seem also to emphasize the rule

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Co. v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, 35 Ch. D. 191, affd. in D. P. 13 App. Ca. 554.

(*s*) *Exp. Odell, Re Walden*, 10 Ch. D. 76, C. A.

(*t*) Per Lord Herschell in *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *North Central Wagon Co.*, 13 App. Ca. at p. 561.

(*u*) *Newlove* v. *Shrewsbury*, 21 Q. B. D. 41, C. A. See *Shepherd* v. *Pulbrook*, 59 L. T. 288, C. A.

(*x*) *Prudential Mortgage Co.* v. *Marylebone Boro'*, 8 L. G. R. 901.

(*y*) *Marsden* v. *Meadows*, 7 Q. B. D. 80, C. A. See *Haydon* v. *Brown*, W. N. (1888) 149, C. A.; *Jones* v. *Tower Furnishing Co.*, 61 L. T. 84; *Stammers* v. *Margrett*, 21 T. L. R. 342.

(*z*) *Re Hood, Exp. Burgess*, 42 W. R. 23, C. A.

that all documents, whatever their form, which pass the title to goods by way of assurance, are bills of sale within the meaning of the Acts (*a*).

If, however, the actual possession of chattels is delivered at the time of the advance, so that the legal possession passes immediately to the grantor, a contemporaneous agreement in writing, merely regulating the rights of parties in regard to the transaction, is not an assurance, nor in any other respect a bill of sale within the meaning of the Acts, and does not require registration (*b*).

Questions arose under the Act of 1854 as to whether agreements to execute future bills of sale came under the category of "other assurances" as being equitable assignments of goods; but such agreements are now expressly included in the definition of a bill of sale by the concluding words of sect. 4 of the Act of 1878 (*c*).

An agreement providing for the payment of the purchase-money of a business, with interest at a future time, and declaring that, until payment, the vendors should have a lien on the business and effects sold, was held to be an "assurance" within the meaning of the Bills of Sale Acts (*d*). So, also, a memorandum of sale of goods entered in an auctioneer's book by his clerk, and signed by the auctioneer on behalf of the purchaser, but otherwise not complying with the requirements of sect. 17 of the Statute of Frauds (*e*), was held to be an assurance of chattels, and consequently void as a bill of sale (*f*).

Hiring agreements.

Hiring agreements are not bills of sale within the meaning of the Acts of 1878 and 1882, so as to require registration as bills of sale, provided that they are properly framed, so that no right of property at law or in equity passes to the hirer until payment of the last instalment, even though the effect of such an instrument may, to some extent, give the owner of the goods a security for the regular payment of instalments by the hirer (*g*); but if it appear from the terms and substance of the instru-

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(*a*) See *ante*, p. 198.

(*b*) *Charlesworth* v. *Mills*, (1892) A. C. 231. See *Exp. Hubbard, Re Hardwick*, 17 Q. B. D. 690, C. A.; *Hilton* v. *Tucker*, 39 Ch. D. 669; *Grigg* v. *National Guardian Assurance Co.*, (1891) 3 Ch. 206.

(*c*) *Ante*, p. 198.

(*d*) *Coburn* v. *Collins*, 35 Ch. D. 373.

(*e*) 29 Car. II. c. 3.

(*f*) *Evans* v. *Roberts*, 36 Ch. D. 196.

(*g*) *Exp. Crawcour, Re Robertson*, 9 Ch. D. 419, C. A.; *Exp. Emerson, Re Hawkins*, 20 W. R. 110. See *Re Davis, & Co., Exp. Rawlings*, 22 Q. B. D. 193; *McEntire* v. *Crossley Brothers*, (1895) A. C. 457; *Clapham* v. *Ives*, 91 L. T. 69.

ment, taken as a whole, that it was the real intention and main purpose of the parties immediately to pass the property in the goods to the hirer, and to create a security on the goods for payment of the price by instalments covering interest, under the colourable pretence of a hiring agreement, then the instrument will be vitiated as a hiring agreement, and will come within the mischief of the Bills of Sale Acts (*h*).

It has been held in several cases that the Court might in such cases disregard the form and terms of the instrument, and look to the circumstances of the particular transaction as a whole as tending to show that the real intention of the parties was to give to the vendor a security or lien for the purchase-money (*i*). It would seem, however, that these decisions are not to be relied upon in any case where the instrument is precise in its terms and clearly defines the rights and obligations of the parties as on the footing of a hiring agreement. In a case, before the House of Lords, where it was argued that the circumstances of the transactions showed it to be not one of hiring, but of sale and mortgage by the purchaser, Lord Herschell, after conceding that the agreement must be regarded as a whole, and that its substance must be looked at, laid down the rule that "there is no such thing as looking at the substance apart from looking at the language which the parties have used" (*k*).

The question, therefore, is one of construction of the particular instrument in each case. It would seem, however, that if the terms of an instrument purporting to be a hiring agreement are equivocal, the Court is at liberty to look at the surrounding circumstances of the particular case, so as to arrive at a true construction of the instrument and to ascertain the real intention of the parties. So it is conceived that, notwithstanding the recent decision of the House of Lords above referred to, the Court may, in accordance with the general rule as to the admissibility of parol evidence to explain a written contract (*l*), take into account the fact that the vendor has parted with the possession of his goods in the usual course of his particular trade,

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(*h*) *Madell* v. *Thomas*, (1891) 1 Q. B. 230, C. A.; *Maas* v. *Pepper*, (1905) A. C. 102.

(*i*) *Re Watson, Exp. Official Receiver*, 25 Q. B. D. 27, C. A.; *Madell* v. *Thomas*, *sup.*; *Beckett* v. *Tower Assets Co.*, (1891) 1 Q. B. 638, C. A.

(*k*) *McEntire* v. *Crossley Brothers*, (1895) A. C. 457, at p. 463. See *United Forty Pound Loan Club* v. *Bexton*, (1891) 1 Q. B. 28, n.

(*l*) See *Myers* v. *Sarl*, 3 E. & E. 306.

under what is known as the hire and purchase system (*m*); but if a private person, or a trader not in the ordinary course of his business, purports to sell the goods to another person and retains possession thereof, under an agreement whereby the purchaser purports to hire them to the vendor, the transaction is obviously open to suspicion, and, unless the terms of the instrument clearly show a contrary intention, the presumption will arise that its intention and effect is to create a security for a loan under the pretence of a hiring agreement, so as to render the instrument void under the Bills of Sale Act, 1882 (*n*), but the presumption may be rebutted (*o*).

Inventory accompanying hiring agreement.

Though an actual and completed sale followed by a hiring agreement, if a separate and distinct dealing, does not come within the Acts (*p*), the case is otherwise if the sale is only part of one security intended to be completed by a hire agreement. Thus an inventory and receipt given together with a hiring agreement for the purpose of securing the money payable under the agreement is apparently within the mischief of the Acts (*q*).

Severability of subject-matter.

A deed may contain distinct and severable contracts or obligations and may be valid as a security, though void as a bill of sale (*r*). So where the owner of a piano assigned by way of security for a loan the piano itself, and also the benefit of an agreement for hire and purchase of the same, it was held that the assignment was severable, and that though the deed was void as a bill of sale of the thing hired, it was valid as an assignment of the agreement (*s*).

Powers of attorney.

The inclusion of "powers of attorney" in the definition of a bill of sale is intended to prevent instruments operating really as bills of sale from being framed in the form of powers of attorney, in order to evade the provisions of the Acts and escape the necessity of registration. It is clear that such instruments, if given by way of security for money, will be void as not being according to the statutable form, but there do not appear to be any reported decisions with regard to such documents (*t*).

(*m*) *Exp. Crawcour, Re Robertson*, 9 Ch. D. 419, C. A. See also *Re Davis, Exp. Rawlings*, 22 Q. B. D. 193, C. A.

(*n*) *Exp. Odell, Re Walden*, 10 Ch. D. 76; *Beckett* v. *Tower Assets Co.*, (1891) 1 Q. B. 638, C. A.; *Maas* v. *Pepper*, (1905) A. C. 102.

(*o*) *Exp. Collins, Re Yarrow*, 59 L. J. Q. B. 18.

(*p*) *Ibid.*

(*q*) *French* v. *Bombernard*, 60 L. T. 49. See *Jones* v. *Tower Furnishing Co.*, 61 L. T. 84; *Prudential Mortgage Co.* v. *Marylebone*, 8 L. G. R. 901.

(*r*) *Post*, p. 240.

(*s*) *Re Isaacson, Exp. Mason*, (1895) 1 Q. B. 333, C. A.

(*t*) See *Coonan* v. *O'Connor*, (1903) 1 Ir. R. 449.

Licences to seize.

Authorities or licences to seize chattels, if given on or after the 1st November, 1882, will be void for the same reason.

A document which does not license taking possession, but only the retention of chattels in the physical possession of one of the parties, is not necessarily a bill of sale (*u*). So an agreement which gives no licence to seize, but only a lien with power to satisfy the lien and enforce the right of detainer, is not within the Act (*x*).

The expression "licence to seize" does not apply to powers of distress contained in mining or other leases (*y*). But the power may be of such a nature as to be entirely outside the relation of landlord and tenant, and have reference only to the relation of debtor and creditor. Thus a brewer's lease authorising the seizure of the stock in trade on default of payment of a current account requires registration (*z*).

A licence in a builder's contract to take possession on default, "as and for liquidated damages," is not within the words of the Act, "as security for any debt" (*a*); nor an agreement that all building and other materials brought by the builder upon the land shall become the property of the landowner (*b*). But where a lessee assigned certain houses in the course of erection, and also all bricks and other building materials which might at any time thereafter be brought by or for the mortgagor into the premises for completing the buildings, it was held that the deed was void for want of registration as a bill of sale in respect of the personal chattels comprised therein (*c*).

As regards bills of sale made before the 1st November, 1882, a distinction has been taken between an assignment of future chattels and a mere power at any time to enter and seize them (*d*).

If there is a mere licence to seize, and no interest in, the future chattels, the licence cannot be exercised to the prejudice

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(*u*) *Spencer* v. *Midland Railway*, 11 T. L. R. 542.

(*x*) *Great Eastern Railway* v. *Lord*, (1909) A. C. 109.

(*y*) *Re Roundwood Colliery*, (1897) 1 Ch. 373.

(*z*) *Exp. Hopcraft*, *Re Flavell*, 14 W. R. 168. See *Pulbrook* v. *Ashby*, 53 L. J. Q. B. 376.

(*a*) *Exp. Newitt*, *Re Garrud*, 16 Ch. D. 522, C. A.; *ante*, p. 193.

(*b*) *Blake* v. *Izard*, 16 W. R. 108; *Brown* v. *Bateman*, L. R. 2 C. P. 272; *Exp. Newitt*, *sup.*; *Reeves* v. *Barlow*, 12 Q. B. D. 436, C. A.; *Re Weibking*, *Exp. Ward*, (1902) 1 K. B. 713; *ante*, p. 193.

(*c*) *Climpson* v. *Coles*, 23 Q. B. D. 465. See *Church* v. *Sage*, 67 L. T. 800.

(*d*) *Carr* v. *Allatt*, 27 L. J. Exch. 385; *Reeve* v. *Whitmore*, 33 L. J. Ch. 63; *Brown* v. *Bateman*, L. R. 2 C. P. 272, 284.

of any person who has obtained an interest in the chattels in the interval before seizure (*e*); but if such licence is *bonâ fide* exercised after, but without notice of, an act of bankruptcy and before adjudication, the seizure is a protected transaction under the bankrupt law (*f*).

Agreements to give bills of sale.

Even under the Bills of Sale Act, 1854, an agreement for a bill of sale, if relied on as an equitable assignment of goods, required registration as a bill of sale under that Act (*g*). So, also, a memorandum in writing whereby debtors undertook to hold their stock in trade, present and future, at the disposal of a creditor and, whenever required by him so to do, to execute a valid transfer and assignment to him as a security for the debt (*h*).

A parol agreement to give a bill of sale is, of course, incapable of registration, and is not within sect. 4 of the Act of 1878 (*i*). Such an agreement is enforceable if the money has passed (*k*); but it will not prevail against the claims of creditors in the event of the borrower's bankruptcy or liquidation, or against a creditor who has levied execution; a formal bill of sale duly registered is necessary for that purpose (*l*). It would also seem that, if a written agreement is followed, immediately on the advance being made, and completion of the security, by a formal bill of sale pursuant to the agreement, such an agreement may be referred to as evidence of the good faith of the transaction, though not registered, nor in the statutable form (*m*).

In such a case, the agreement, though in writing, is not itself relied upon as giving any equitable right to a security, inasmuch as it is not enforceable in equity until the advance is actually made (*n*).

It would seem also that if a borrower agrees in writing to secure money advanced to him by a formal bill of sale, which is subsequently given accordingly, the fact that the agreement is not registered, nor according to the statutable form, will not affect the validity of the bill of sale, as it is conceived that the

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(*e*) *Re Waugh*, 4 Ch. D. 527.

(*f*) *Exp. Newitt*, 16 Ch. D. 522, C. A.

(*g*) *Exp. Mackay*, *Re Jeavons*, L. R. 8 Ch. 643.

(*h*) *Exp. Conning*, *Re Steele*, L. R. 16 Eq. 414. See *Exp. Montague*, *Re O'Brien*, 1 Ch. D. 554, C. A.; *Bayhott* v. *Norman*, 41 L. T. 787.

(*i*) *Exp. Hauxwell*, *Re Hemingway*, 23 Ch. D. 626, C. A.

(*k*) See *ante*, p. 62.

(*l*) *Jarvis* v. *Jarvis*, W. N. (1893) 138; 63 L. J. Ch. 10.

(*m*) *Exp. Hauxwell*, *Re Hemingway*, 23 Ch. D. 626, C. A.

(*n*) *Rogers* v. *Challis*, 27 Beav. 175. See *ante*, p. 59.

money will be deemed to have been advanced on the security of the bill, which will be treated as standing on the same footing as if it had been given at the time of the advance, according to the rule laid down in a case decided under the Act of 1854 (*o*).

But it is clear that, until a bill of sale has been given pursuant to an unregistered agreement in writing, the lender will have no security upon the goods for repayment of his money, as the instrument on which he relies as conferring on him a right in equity to a security will be a bill of sale within the meaning of the Acts, and therefore void (*p*).

Agreement securing right in equity.

It has been held that the expression, in sect. 4 of the Act of 1878, "any agreement by which a right in equity to any personal chattels or to any charge or security thereon shall be secured," is to be strictly construed, and accordingly that the expression does not include documents which do not confer an equitable right, or right to take possession (*q*).

So an agreement which is not a licence to take possession of personal chattels, but only a right to detain the chattels under certain circumstances coupled with an authority to sell, is not a bill of sale (*r*).

So, where an owner of goods which had been seized under a *fi. fa.*, agreed verbally with the auctioneer that, in consideration of his paying out the sheriff, the auctioneer should hold the goods and sell them, and pay the surplus of the proceeds to the owner; the sheriff was paid out and the man in possession remained in possession on behalf of the auctioneer in accordance with the terms of the agreement, which were then reduced to writing; it was held that, inasmuch as the agreement was not intended to operate, and did not operate, till the possession had passed from the sheriff to the auctioneer, and as the agreement did not constitute the title of the latter, the document was not a bill of sale within the meaning of the Acts (*s*).

By sect. 6 of the Act of 1878, it is enacted as follows:—

Certain instruments giving

"Every attornment, instrument or agreement not being a mining lease, whereby a power of distress is given or agreed to

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(*o*) *Harris* v. *Rickett*, 4 H. & N. 1. See *Mercer* v. *Peterson*, L. R. 3 Ex. 104; *Exp. King*, *Re King*, 2 Ch. D. 256, C. A.

(*p*) *Edwards* v. *Edwards*, 2 Ch. D. 291.

(*q*) *Reeves* v. *Barlow*, 12 Q. B. D. 436; *Exp. Hubbard*, *Re Hardwick*, 17 Q. B. D. 690, C. A.; *Morris* v. *Delobbel-Flipo*, (1892) 2 Ch. 352.

(*r*) *Great Eastern Railway* v. *Lord's Trustee*, (1909) A. C. 109.

(*s*) *Charlesworth* v. *Mills*, (1892) A. C. 231.

powers of distress to be subject to this Act.

be given by any person to any other person by way of security for any present, future or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of the Act, of any personal chattels which may be seized or taken under such power of distress. Provided that nothing in that section shall extend to any mortgage of any estate or interest in any land, tenement or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant, at a fair and reasonable rent."

Attornment clause.

The effect of this section in invalidating clauses of attornment by the mortgagor to the mortgagee, and powers of distress in mortgages of land, will be considered in a subsequent chapter (*t*).

Exclusion of certain instruments from interpretation of term "bill of sale."

iii.—What Instruments are not "Bills of Sale" within the Acts.—By sect. 4 of the Act of 1878 (which in this respect is identical with sect. 7 of the Act of 1854), it is enacted that the expression "bill of sale" shall not include the following documents:—

"Assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented."

Assignments for creditors.

Assignments for the benefit of creditors must, in order to fall within the exception, be for the equal benefit of all the creditors, though it need not be executed by all (*u*). An assignment for the benefit of all creditors who shall elect to execute the same is an assignment for the benefit of all (*x*). And a proviso that no creditor shall benefit who shall not assent to the deed within

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(*t*) *Post*, Chap. XXXVI.

(*u*) *General Furnishing, &c. Co.* v. *Venn*, 2 H. & C. 153; *Johnson* v. *Osenton*, L. R. 4 Ex. 108; *Exp. Viney, Re Adamson*, 2 Mans. 153. See *Exp. Parsons, Re Townsend*, 16 Q. B. D. 532, C. A.

(*x*) *Paine* v. *Matthews*, 53 L. T. 872.

a fixed time will not prevent the deed from falling within the exception (*y*).

By the Deeds of Arrangement Acts, 1887 and 1890 (*z*), deeds of arrangement, as defined by the former Act, for the benefit of creditors generally must be registered at the time and in manner thereby prescribed, or will be void. Deeds of arrangement affecting land must be registered under the Land Charges Registration and Searches Act, 1888 (*a*).

Marriage settlements.

The exception in favour of "marriage settlements" extends to agreements for settlements made in contemplation of marriage, though informal and not under seal (*b*); but not post-nuptial settlements, unless made pursuant to such agreements (*c*).

Transfers or assignments of ships.

This exception extends to transfers, &c. of ships and vessels, of river barges, and all vessels beyond mere boats (*d*); of ships or vessels, though unfinished (*e*); of foreign ships (*f*); and of all articles and materials on board at the time of the mortgage, or brought on board subsequently in substitution therefor, which are necessary for the prosecution of the voyage (*g*).

Transfers in the ordinary course of business.

The Bills of Sale Acts do not apply to letters of hypothecation accompanying deposits of goods by merchants or factors, or to pawn-tickets, or to any case where the object and effect of the transaction are not to transfer any right in equity, but only to regulate the legal right to possession of the grantee (*h*). *Quære*, whether letters of lien are "transfers of goods in the ordinary course of business" within the exception (*i*).

But it seems that a pledge by a trader of stock in trade, which he has bought and not paid for, is not a transfer in the ordinary course of business within the exception (*k*).

An undertaking by merchants to hold goods at the disposal of brokers who had supplied goods on credit, and when required

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(*y*) *Hadley & Son* v. *Beedom*, (1895) 1 Q. B. 646.

(*z*) 50 & 51 Vict. c. 57; 53 & 54 Vict. c. 24.

(*a*) 51 & 52 Vict. c. 51. ss. 7—9.

(*b*) *Wenman* v. *Lyon*, (1891) 2 Q. B. 192, C. A.; *Re Reis*, *Exp. Clough*, (1904) 2 K. B. 769, C. A.

(*c*) *Fowler* v. *Foster*, 5 H. & C. 99; *Ashton* v. *Blackshaw*, L. R. 9 Eq. 518. See *Exp. Cox*, *Re Reed*, 1 Ch. D. 302.

(*d*) *Gapp* v. *Bond*, 19 Q. B. D. 200, C. A.

(*e*) *Exp. Hodgkin* (or *Winter*), *Re Softley*, L. R. 20 Eq. 746.

(*f*) *Union Bank* v. *Lenanton*, 3 C. P. D. 243, C. A.

(*g*) *Coltman* v. *Chamberlain*, 25 Q. B. D. 328.

(*h*) *Exp. Close*, *Re Hall*, 14 Q. B. D. 386. See *Reeves* v. *Barlow*, 12 Q. B. D. 436, C. A.; *Exp. Parsons*, *Re Townsend*, 16 Q. B. D. 532; *Exp. Hubbard*, *Re Hardwick*, 17 Q. B. D. 690, 695, 700, C. A.; *Re Cunningham & Co.*, *Attenborough's Case*, 28 Ch. D. 682; *Morris* v. *Delobbel-Flipo*, (1892) 2 Ch. 352.

(*i*) *Re Hamilton. Young & Co.*, *inf.*

(*k*) *Exp. Close*, *Re Hall*, 14 Q. B. D. at p. 394.

to execute a formal transfer, was held to require registration as a bill of sale (*l*).

Documents used as proof of possession.

Letters of lien given by traders to a bank in respect of advances from time to time made by the bank to enable the traders to purchase goods for shipment and stated to be loans on the security of the goods, were held to be "documents used in the ordinary course of business as proof of the possession or control of goods" within the exception in sect. 4 (*m*).

Bills of sale of goods abroad.

The exception of bills of sale of goods in foreign parts extends to bills of sale of goods in Ireland or Scotland (*n*). But a bill, registered in England, of goods, some of which were in Ireland, was held to protect the goods against an execution levied in Ireland by a creditor who had obtained an English judgment (*o*).

Delivery order.

Where a borrower gave a promissory note for the loan, and at the same time signed and gave to the lender a memorandum agreeing to pay interest on the amount advanced, and also gave an order to a warehouseman to deliver to the lender certain warehoused furniture and effects of the borrower, it was held the delivery order was not a bill of sale (*p*).

Wrongful registration.

An action for damages will not lie by reason of the registration, without malice, of a document which was not, in fact, a bill of sale requiring registration (*q*).

Definition of the term "personal chattels."

iv.—What Things are "Personal Chattels" within the Acts.—Sect. 4 of the Act of 1878 enacts as follows :—

> "The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery, as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant

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(*l*) *Exp. Conning, Re Steele*, L. R. 16 Eq. 414. See *Tennant* v. *Howatson*, 13 App. Ca. 489.

(*m*) *Re Hamilton, Young & Co.*, (1905) 2 K. B. 772.

(*n*) *Coote* v. *Jecks*, L. R. 13 Eq. 597.

(*o*) *Brooker* v. *Harrison*, 6 L. R. Ir. 332.

(*p*) *Grigg* v. *National Guardian Assurance Co.*, (1891) 3 Ch. 206.

(*q*) *Horsley* v. *Style*, 69 L. T. 222.

or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale."

The expression "personal chattels" has the same meaning in the Act of 1882 as in the principal Act (*r*).

Extent of definition.

"Goods, furniture, fixtures, and other articles capable of complete transfer by delivery" were included in the definition of personal chattels given by the Act of 1854, and it was held that this definition of personal chattels is only for the purposes of the Bills of Sale Acts, and not for all purposes (*s*).

The law as to fixtures and growing crops is altered by sect. 4 of the Act of 1878; in other respects the language of sect. 17 of 1854 is unaltered, and the decisions under that Act appear to be still applicable.

Goods, &c. passing by delivery.

It has been seen that the expression "chattels personal" may have an extended meaning so as to include all personal property other than chattels real (*t*); but for the purposes of the Bills of Sale Acts only such goods, &c., are deemed to be "personal chattels" as are capable of complete transfer by delivery. The legal meaning of the expression "delivery" has been considered elsewhere (*u*).

Fixtures and growing crops.

The definition "personal chattels" for the purposes of the Acts also includes fixtures or growing crops when separately assigned or charged.

Fixtures.

Under the Act of 1854, it was held that the word "fixtures," no less than the immediately following words, "and other articles," was controlled or qualified by the succeeding words, "capable of complete transfer by delivery" (*x*), and that "fixtures" meant things which, in contemplation of law, have a separate existence as fixtures, as distinct from their connection with and adhesion to the freehold (*y*); but the Act of 1878 apparently includes all fixtures, if separately assigned or charged, whether capable of delivery or not at the time of the execution of a bill of sale thereof so as to require registration of such bill of sale.

Growing crops.

Growing crops were not included in the definition of "per-

(*r*) See sect. 3 of the Act of 1882.

(*s*) *Meux* v. *Jacobs*, L. R. 7 H. L. 481.

(*t*) See *ante*, p. 180.

(*u*) See *post*, Chap. LXIII., Sect. I. (ii).

(*x*) *Waterfall* v. *Penistone*, 3 Jur. N. S. 17; 6 E. & B. 876.

(*y*) *Exp. Daglish*, L. R. 8 Ch. 1080, 1081.

sonal chattels" given by the Act of 1854; and accordingly it was held that an assignment of growing crops did not require registration under that Act (*z*); but now though, if assigned together with the land, they are not within the Acts of 1878 or 1882, yet, as soon as severed from the land, they become personal chattels, and an assignment thereof will be a bill of sale, and require registration, whether or not the same instrument also contains an assurance of an interest in the land (*a*). If growing crops not severed are assigned separately from the land on which they are growing, they are personal chattels within the meaning of sect. 4 of the Act of 1878, and a bill of sale thereof must be registered accordingly (*b*), though, as will be seen presently (*c*), such a bill of sale need not comply with the formalities prescribed by the Act of 1882.

The Act of 1878 also contains the following enactment:—

Fixtures or growing crops not to be deemed separately assigned when the land passes by the same instrument.

Sect. 7. "No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same person or persons.

"The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of this Act, and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any Court, which shall take place or be issued after the commencement of this Act."

Trade machinery.

The expression "personal chattels," for the purposes of the Bills of Sale Acts, also includes trade machinery, as to which the Act of 1878 contains the following provisions:—

Application of Act to trade machinery.

Sect. 5. "From and after the commencement of the Act, trade machinery shall, for the purposes of the Act, be deemed to be personal chattels, and any mode of disposition of trade machinery

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(*z*) *Brantom* v. *Griffits*, 2 C. P. D. 212, C. A. See *Newman* v. *Cardinal*, 2 F. & F. 840; *Exp. Payne, Re Cross*, 11 Ch. D. 539, C. A.

(*a*) *Exp. National Mercantile Bank, Re Phillips*, 16 Ch. D. 104, C. A.

(*b*) *Clements* v. *Matthews*, 11 Q. B. D. 808, C. A.

(*c*) See *post*, p. 226.

by the owner thereof, which would be a bill of sale as to any other personal chattels, shall be deemed to be a bill of sale within the meaning of the Act.

For the purposes of the Act—

'Trade machinery' means the machinery used in or attached to any factory or workshop;

1st. Exclusive of the fixed motive powers, such as the water wheels and steam engines, and the steam boilers, donkey engines, and other fixed appurtenances of the said motive powers; and

2nd. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose; and

3rd. Exclusive of the pipes for steam, gas, and water, in the factory or workshop.

The machinery or effects excluded by the section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of the Act.

'Factory or workshop' means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them; that is to say,

(a) In or incidental to the making any article or part of an article; or

(b) In or incidental to the altering, repairing, ornamenting, finishing, of any article; or

(c) In or incidental to the adapting for sale any article."

Extent of definition.

The definition of "trade machinery" given in this section is apparently only for the purposes of the Bills of Sale Acts, not for all purposes (*d*).

A mortgage of land, whether legal (*e*) or equitable (*f*), will pass, without necessity for registration as a bill of sale, to the mortgagee, the fixtures on the land and, as such, all trade machinery which is affixed or annexed to the land. And the rule applies equally where the conveyance expressly mentions such machinery, either by reference to a schedule or otherwise (*g*).

But sect. 7 of the Act of 1878 does not apply to trade machinery; and, accordingly, if the mortgagee desires that his

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(*d*) See *Meux* v. *Jacobs*, L. R. 7 H. L. 481.

(*e*) *Re Yates, Batcheldor* v. *Yates*, 38 Ch. D. 112, C. A. See *Exp. Moore and Robinson's Banking Co., Re Armytage*, 14 Ch. D. 379; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123; *Sheffield and South Yorks, &c. Building Society* v. *Harrison*, 15 Q. B. D. 358.

(*f*) *Exp. Lusty, Re Lusty*, 60 L. T. 160.

(*g*) *Re Brooke, Brooke* v. *Brooke* (No. 2), (1894) 2 Ch. 600. See, further, as to fixtures generally, including trade machinery, *ante*, p. 125.

power of sale shall enable him to seize and sell the fixed trade machinery apart from the land, he must take a bill of sale of the machinery (*h*). And the same rule will apply if, on the construction of the mortgage deed, it appears that the mortgagee has impliedly such a power (*i*). The rule applies to leaseholds as well as to freeholds (*k*).

A deed, though void as a bill of sale by reason of its comprising trade machinery, may be valid as to the land and other fixtures comprised therein (*l*). So where a written agreement for securing unpaid purchase-money, whereby it was provided that, in certain events, the vendors should have power to enter on the land sold, and take possession thereof and of everything placed thereon, and "which should not require registration within the Bills of Sale Act, 1878," was held not to include trade machinery within the meaning of the Act, but to be valid in other respects without registration (*m*).

Vendor's lien.

A vendor's lien extends to trade machinery affixed to land, and being given by law, the Acts do not apply, for there is nothing which can be registered (*n*).

Articles excepted from the definition.

The exception from the definition of trade machinery applies to the excepted articles, though they are not actually affixed to the land with which they are assigned; and the effect of the exception is to exclude the excepted articles from the definition of "trade machinery" for all purposes, so that an assignment of such articles does not require registration under the Act of 1878, and, if by way of security for money, need not be in compliance with the requirements of the Act of 1882 (*o*).

"Factory or workshop."

The Factory and Workshop Act, 1878 (*p*), gives a definition, for the purposes of that Act, of factory and workshop.

Fixtures and growing crops assigned with land.

v.—What Things are not Personal Chattels within the Acts.—Fixtures and growing crops assigned together with the land are excepted from the operation of the Bills of Sale Acts.

It has been seen that a mortgage of freeholds or copyholds

(*h*) *Re Yates, Batcheldor* v. *Yates*, 38 Ch. D. 112, C. A. See *Climpson* v. *Coles*, 23 Q. B. D. 465; *Jarvis* v. *Jarvis*, W. N. (1893) 138; 63 L. J. Ch. 10.

(*i*) *Small* v. *National Provincial Bank of England*, (1894) 1 Ch. 686.

(*k*) *Johns* v. *Ware*, (1899), 1 Ch. 359.

(*l*) *Re Burdett, Exp. Byrne*, 20 Q. B. D. 310, C. A.

(*m*) *Re London and Lancashire Paper Mills Co.*, W. N. (1888) 36; 58 L. T. 798.

(*n*) *Re Vulcan Ironworks Co.*, W. N. (1888) 37.

(*o*) *Topham* v. *Greenside Glazed Firebrick Co.*, 37 Ch. D. 281.

(*p*) 41 & 42 Vict. c. 16, s. 93; *Redgrave* v. *Lea*, L. R. 9 Q. B. 363.

will pass without mention all fixtures properly so called, that is to say, all articles which are affixed or attached to the soil, except such articles as by custom or judicial decision have come to be regarded as tenant's fixtures, and removeable by a tenant or his assigns during or on the expiration of his tenancy, and further, that a mortgage of leaseholds will pass not only the lessee's interest in the land and in the landlord's fixtures as part thereof, but also, without special mention, all tenant's fixtures belonging to the mortgagor, and removeable by him as against his landlord (*q*); but by sect. 7 of the Act of 1878 (*r*) an assignment of fixtures (other than trade machinery), together with the land, will not require registration by reason only of its specifically mentioning the fixtures assigned.

Similarly, an assurance of land will pass the crops growing thereon, and also future crops as they arrive at maturity (*s*). So a mortgage by a tenant of all his tenant-right and interest yet to come has been held to pass the future crops (*t*).

Stock and shares.

Sect. 4 of the Act of 1878 also excepts from the definition of personal chattels, for the purposes of the Bills of Sale Acts, shares and interests in Government stocks, &c., and in the capital or property of companies, which do not seem to require any detailed consideration; also choses in action (*u*).

Choses in action.

The exception of choses in action covers book debts accruing in the ordinary course of trade, a mortgage or charge of which, therefore, need not be according to the statutable form, and will not require registration under the Act (*x*).

Book debts.

If it is intended that stock in trade and book debts should be assigned as a security for the same loan, it will generally be advisable that the two different kinds of property should be assigned by separate instruments (*y*).

Share in partnership.

A share in a partnership is a chose in action within the exception of sect. 4; so that a mortgage of such a share, though expressly including plant, stock in trade, and effects, is not within the Bills of Sale Acts, and does not require registration (*z*); such a mortgage only entitles the mortgagee to an account of the profits and property of the partnership, and does

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(*q*) See *ante*, p. 127.

(*r*) See *ante*, p. 214.

(*s*) *Bagnall* v. *Villar*, 12 Ch. D. 812; *Re Gordon*, 61 L. T. 299.

(*t*) *Petch* v. *Tutin*, 15 M. & W. 110.

(*u*) See *ante*, p. 212.

(*x*) See further as to mortgages of debts, *post*, Chap. XIX.

(*y*) See *post*, p. 240.

(*z*) *Exp. Fletcher*, *Re Bainbridge*, 8 Ch. D. 218.

not entitle him to seize any specific effects as representing the share of the mortgagor (*a*).

Rights to chattels.

An assignment of the benefit of a hire-purchase agreement is an assignment of a chose in action, and does not therefore require registration (*b*), even though the goods themselves purport to be assigned (*c*).

So is an assignment of a reversionary interest in chattels bequeathed by a will (*d*) or in chattels settled as heirlooms (*e*).

vi.—Exception of Debentures.—By sect. 17 of the Act of 1882, it is enacted that—

Debentures to which Act not to apply.

"Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital, stock, or goods, chattels and effects of such company."

Effect of this enactment.

The effect of the exclusion of debentures from the operation of the Act of 1882 is to exempt them also from the operation of the Act of 1878, and accordingly from any necessity that they should be registered as bills of sale (*f*). But if made after the year 1900 they must be registered under the Companies Act, 1900 (*g*) or the Companies Act, 1908 (*g*).

Meaning of "debenture."

A debenture, within the meaning of this section, may consist of a single document charging property with payments of sums advanced by several lenders (*h*), but the document must create or acknowledge a specific debt (*i*).

Whether covering trust deed must be registered.

Where debentures were not charged upon any property of the company, but were secured by an assignment of property which was not duly registered as a bill of sale, it was held that the debenture was not within the exception (*k*). But in a later case it was intimated that a covering trust deed is not within the Acts, and it was held that, even if the covering deed be void for want of registration, the debentures may be so framed as of

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(*a*) See *post*, Chap. XXVIII.

(*b*) *Re Davis, Exp. Rawlings*, 22 Q. B. D. 193, C. A.

(*c*) *Re Isaacson, Exp. Mason*, (1895) 1 Q. B. 333.

(*d*) *Re Singleton, Exp. Tritton*, 61 L. T. 301.

(*e*) *Re Thynne*, (1911) 1 Ch. 282.

(*f*) *Read* v. *Joannon*, 25 Q. B. D. 300. See *Re Asphaltic Wood Pavement Co.*, W. N. (1883) 152; *John Welsted & Co.* v. *Swansea Bank*, 5 T. L. R. 332.

(*g*) 63 & 64 Vict. c. 48, s. 14; 8 Edw. 7, c. 69, s. 93.

(*h*) *Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 215. See *Levy* v. *Abercorris Slate, &c. Co.*, 37 Ch. D. 260.

(*i*) *Topham* v. *Greenside Glazed Firebrick Co.*, 37 Ch. D. 281.

(*k*) *Brocklehurst* v. *Railway Printing Co.*, W. N. (1884) 70; *Jenkinson* v. *Brandley Mining Co.*, 19 Q. B. D. 568.

themselves to create, by virtue of sect. 17, a valid equitable charge in favour of the debenture holders without registration (*l*).

What companies are within sect. 17.

The words, "or other incorporated company," are not limited to companies incorporated according to English law, but apply to a company registered in Guernsey (*m*). Nor are they limited to companies *ejusdem generis* with mortgage or loan companies, but include any company for the registration of the mortgages of which provision is made by the Companies Clauses Act, 1845, or the Companies Acts (*n*). But companies, in the case of which no statutory provision has been made for the registration of their mortgages, as for instance societies registered under the Industrial and Provident Societies Acts, are not exempted by sect. 17 from the necessity that their debentures or mortgages should be registered, and should in other respects comply with the requirements of the Bills of Sale Acts (*o*).

Exemption of letters of hypothecation of imported goods from 45 & 46 Vict. c. 43, s. 9.

By sect. 1 of the Bills of Sale Act, 1890 (*p*), letters of hypothecation of imported goods were exempted from the provisions of sect. 9 of the Act of 1882, which requires bills of sale to be in accordance with the statutable form in the schedule to that Act, but in other respects the documents so exempted were left within the operation of the Bills of Sale Acts.

Exemption of securities on imported goods from 41 & 42 Vict. c. 31, and 45 & 46 Vict. c. 43.

But by the Bills of Sale Act, 1891 (*q*), it is enacted that sect. 1 of the Act of 1890 shall be read as follows :—

> "An instrument charging or creating any security on, or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being reshipped for export, or delivered to a purchaser, not being the person giving or executing such instrument, shall be deemed a bill of sale within the meaning of the Bills of Sale Acts, 1878 and 1882" (*r*).

vii.—After-acquired Chattels.—By the Act of 1882, it is enacted as follows :—

Bill of sale to have schedule of property.

Sect. 4. "Every bill of sale shall have annexed thereto or written thereon a schedule of the personal chattels comprised in the

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(*l*) *Ross* v. *Army and Navy Hotel Co.*, 34 Ch. D. 43, C. A.

(*m*) *Clark* v. *Balm Hill & Co.*, (1908) 1 K. B. 667.

(*n*) *Re Standard Manufacturing Co.*, *Exp. Lowe*, (1891) 1 Ch. 627, C. A. See *Re Opera Ltd.*, (1891) 3 Ch. 260.

(*o*) *Great Northern Rail. Co.* v. *Coal Co-operative Society*, (1896) 1 Ch. 187; but see *Clark* v. *Balm Hill & Co.*, *sup.*

(*p*) 53 & 54 Vict. c. 53.

(*q*) 54 & 55 Vict. c. 35.

(*r*) See *Re Hamilton, Young & Co.*, (1905) 2 K. B. 772.

bill of sale, and such bill of sale, save as hereinafter mentioned (*s*), shall have effect only in respect of the chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described."

Bill of sale not to affect after-acquired property.

Sect. 5. "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner, at the time of the execution of the bill of sale."

Exceptions.

But sect. 6 thereof excepts out of these sections growing crops separately assigned or charged, and fixtures, plant or trade machinery substituted for fixtures, plant, or trade machinery specifically described in the schedule (*t*).

General effect of above enactments.

The effect of these sections (except as regards the articles excluded by sect. 6) is to render nugatory, except as against the grantor, any attempt to assign or charge, by a bill of sale given by way of security for payment of money, any after-acquired chattels of the grantor, whether specifically described or not. And, by the operation of sect. 9 of the same Act, such a bill of sale, purporting to assign after-acquired chattels by a general description, is absolutely void, even as against the grantor himself, as not being in accordance with the statutable form (*u*). The result is that the law relating to assignments by way of mortgage of after-acquired chattels (with certain exceptions), is virtually abrogated so far as regards instruments made on or after the 1st of November, 1882.

Inclusion of after-acquired property in bills of sale prior to 1st November, 1882.

Inasmuch, however, as the inclusion in a bill of sale of after-acquired property is nowhere expressly forbidden by the Act of 1878 or the Act of 1882, questions may, possibly, still arise under bills of sale made previously to that date, and kept alive by re-registration, or may arise as between grantor and grantee under the Act of 1882, and, accordingly, the former law as to assignments of after-acquired chattels will be here very briefly noticed.

After-acquired chattels not generally assignable at common law.

As a general rule an assignment would not at common law have passed chattels not in existence, or not in the ownership

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(*s*) The words, "save as hereinafter mentioned," apparently refer to the exception as regards the grantor in the last clause of this section, as well as to the exception of the things mentioned in sect. 6.

(*t*) See this section set out *post*, p. 226.

(*u*) *Thomas* v. *Kelly*, 13 App. Ca. 506; *Hadden, Best & Co.* v. *Oppenheim*, 60 L. T. 962.

of the grantor, at the time of the assignment, unless the grantor did some act after he acquired the property in furtherance of the original disposition and amounting to a ratification thereof (*x*), or, unless the mortgage was so framed as to give to the mortgagee licence or a power of seizing future chattels of the grantor as they should be acquired by him and brought upon the premises, and such licence is acted upon (*y*).

Secus, in equity.

But in equity, where the assignment included future chattels, or if there was a covenant that all future chattels should be included in the security, the interest in such future chattels passed, and attached without possession as soon as the chattels were brought on the premises (*z*).

Where a bill of sale included future chattels brought on the premises, and the mortgagor became bankrupt and was discharged, it was held that the security did not include chattels brought on the premises after the discharge, for that the assignment of those chattels amounted only to a contract to assign from which he was released by the discharge (*a*).

Power to seize after-acquired chattels.

A power to seize after-acquired goods might be inserted in a mortgage deed, and would operate by way of licence, which, being for valuable consideration, would be irrevocable (*b*). Such a power followed by actual seizure, vested the property, at law, in the grantee (*c*); and a power to seize would, without actual seizure, create a good equitable charge upon after-acquired chattels, which would have priority over execution creditors (*d*). If the licence were not so framed as to operate in equity as a present assignment, and if the grantor were to become bankrupt before seizure, the title of his trustee in bankruptcy would prevail (*e*); but a power to seize future chattels would not of itself make a bill of sale fraudulent and an act of bankruptcy (*f*).

(*x*) Bac. Max., r. 14; Perk. Profit, Bk tit. "*Grant*," pl. 65.

(*y*) Per Tindal, J., in *Lunn* v. *Thornton*, 1 C. B. 379. See *Carr* v. *Allatt*, 27 L. J. Ex. 385.

(*z*) *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Congreve* v. *Evetts*, 10 Exch. 298; *Hope* v. *Hayley*, 5 E. & B. 830; *Carr* v. *Acraman*, 11 Exch. 566; *Lomax* v. *Buxton*, L. R. 6 C. P. 107; *Belding* v. *Reed*, 3 H. & C. 955. See *Reeves* v. *Barlow*, 12 Q. B. D. 436, C. A.

(*a*) *Collyer* v. *Isaacs*, 19 Ch. D. 342, C. A. See *Thompson* v. *Cohen*, L. R. 7 Q. B. 527; *Cole* v. *Kernot*, L. R. 7 Q. B. 534, n.

(*b*) *Lunn* v. *Thornton*, 1 C. B. 385. But see *Carr* v. *Acraman*, 11 Exch. 566.

(*c*) *Congreve* v. *Evetts*, 10 Exch. 298; *Hope* v. *Hayley*, 5 E. & B. 830. See *Cole* v. *Kernot*, L. R. 7 Q. B. 534, n.; *Morris* v. *Delobbel-Flipo*, (1892) 2 Ch. 352.

(*d*) *Langton* v. *Horton*, 1 Ha. 549; *Holroyd* v. *Marshall*, 10 H. L. C. 191.

(*e*) *Carr* v. *Acraman*, 11 Exch. 566. See, also, *Reeve* v. *Whitmore*, 4 De G. J. & S. 1; *Carr* v. *Allatt*, 27 L. J. Ex. 385; *Brown* v. *Bateman*, L. R. 2 C. P. 272.

(*f*) *Hutton* v. *Crutwell*, 1 E. & B. 15.

An assignment of after-acquired chattels passes only an equitable interest to the assignee, and if, after the chattels have come into existence and before the mortgagee has taken possession of them, another person, without notice of the mortgage, acquires the legal title to the chattels, his title will prevail, both at law and in equity, against that of the mortgagee (*g*).

After-acquired chattels must be ascertainable.

The intention to include after-acquired property must formerly have been clear, and would not be inferred from doubtful expressions (*h*).

But after some conflict of opinion, it is now settled that an assignment in a bill of sale not falling within the Act of 1882, expressly including after-acquired chattels, will be valid and effectual if the chattels can be ascertained at the time when the security is enforced, though they may not be capable of ascertainment at the time when the security is given (*i*).

An assignment may, however, be so vague and uncertain that the Court will be unable to give it any effect (*k*).

But a covenant by a husband in his marriage settlement to settle all his after-acquired property except business assets is not too vague (*l*).

The bill of sale of future chattels is generally made with reference to some specific place, and where it extended to chattels in a house, *or elsewhere*, it was held not to be effectual (*m*).

The schedule or inventory.

viii.—The Schedule or Inventory.—As regards bills of sale by way of security for money, made or given on or after the 1st November, 1882, sect. 4 of the Act of that year requires every such bill of sale to have a schedule of the personal chattels comprised therein.

This enactment deals with the material precision of the description as distinguished from the form thereof, which is dealt with by sect. 9 of the same Act. Thus, a bill of sale which in the schedule thereto annexed specifically describes the chattels personal assigned with sufficient precision to satisfy the require-

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(*g*) *Joseph* v. *Lyons*, 15 Q. B. D. 280, C. A.; *Hallas* v. *Robinson*, 15 Q. B. D. 288, C. A.

(*h*) *Tapfield* v. *Hillman*, 6 Man. & Gr. 245; *Reeve* v. *Whitmore*, 4 De G. J. & S. 1; *Exp. Stephenson*, De G. 586.

(*i*) *Tailby* v. *Official Receiver*, 13 App. Ca. 523. See *Lazarus* v. *Andrade*, 5 C. P. D. 318.

(*k*) *Re D'Epineuil*, *Tadman* v. *D'Epineuil*, 20 Ch. D. 758.

(*l*) *Re Reis*, *Exp. Clough*, (1904) 2 K. B. 769.

(*m*) *Belding* v. *Read*, 34 L. J. Ex. 212. See now *Tailby* v. *Official Receiver*, *sup.*

ments of sect. 4, but also includes in such schedule realty or chattels real, will be absolutely void as departing from the statutable form prescribed by sect. 9 (*n*). On the other hand, if a bill of sale in the form given by the Act is followed by an inventory which describes chattels, but as to some of them contains no specific description, such bill of sale, being in accordance with the form, could not be avoided by sect. 9, but being imperfect under sect. 4, it would be avoided as to the chattels imperfectly described against everyone but the grantor (*o*).

Whether schedule will enlarge operation of deed.

Formerly a schedule or inventory annexed or referred to in a deed was not deemed to be part of the deed, and would not have been altered to enlarge the operation of the deed by making it include things not covered by the general description of the parcels. So where a mortgage of chattels referred to an inventory for more particular enumeration, stock-in-trade included in the inventory, but not mentioned in the deed, was held not to pass by it (*p*). It would seem, however, that the effect of the requirement of sect. 4, that every bill of sale shall have annexed thereto, or written thereon, a schedule or inventory, is to make such schedule or inventory a necessary part of the deed, and that every article specifically mentioned in such schedule or inventory will be included in the security (*q*).

Schedule may limit operation of deed.

On the other hand, even under the former Bills of Sale Acts, it was repeatedly held that if a bill of sale contained in its operative part a general description of the parcels, referring to a schedule for more particular description, only such articles as were specifically described in the schedule would pass by the deed (*r*). This rule is expressly enacted, except as against the grantor, by sect. 4 of the Act of 1882.

Goods received after execution.

Goods bought before, but not received by the grantor till after the execution of a bill of sale, pass if sufficiently described in the schedule (*s*).

What description in schedule is sufficient.

The description of the mortgaged chattels in the schedule to the bill of sale must be sufficiently precise to render the chattels capable of identification. The chattels must be as specifically

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(*n*) *Cochrane* v. *Entwistle*, 25 Q. B. D. 116, C. A. See *post*, p. 241.

(*o*) Per Fry, L.J., in *Kelly & Co.* v. *Kellond*, 20 Q. B. D. 569, C. A. at p. 574.

(*p*) *Exp. Jardine, Re McManus*, L. R. 10 Ch. 322.

(*q*) See *Melville* v. *Stringer*, 12 Q. B. D. 132.

(*r*) *Wood* v. *Rowcliffe*, 6 Exch. 407; *Harrison* v. *Blackburn*, 17 C. B. N. S. 678; *Dowling* v. *Stuart*, W. N. (1885) 98.

(*s*) *Sladden* v. *Sergeant*, 1 F. & F. 322.

described as is usual in such inventories as are usually made for business purposes with regard to the particular subject-matter (*t*). So the following description in the schedule to a bill of sale given by a picture dealer—"at 47, M—— Street, 450 oil paintings in gilt frames, 300 oil paintings unframed, 50 water-colours in gilt frames, 20 water-colours unframed, and 20 gilt frames"—was held to be an insufficient description within the requirements of sect. 4, it not being shown that the things described were all the things in the grantor's shop (*u*). Still less is a mere general description sufficient, such as "all household furniture and effects," or the like, at a certain place (*x*). But if it appears that articles described by way of enumeration in the schedule are the only articles upon the premises answering the description, it would seem that the description will be sufficient (*y*). So the following description in a schedule was held to be sufficient—"the whole of the chattels and things at present at W—— Vicarage, and consisting, *inter alia*, of . . . . study . . . . 1,800 volumes of books as per catalogue"—the articles not being individually described and the catalogue not being annexed to the schedule (*z*).

When the chattels are of a kind which in the ordinary course of things should be replaced from time to time, such as live farm stock, a more specific description is required than in the case of more permanent chattels, such as furniture (*a*).

Clerical errors in description.

A mere clerical error in description, not calculated to deceive, will not avoid a bill of sale on the ground of misdescription of the chattels (*b*).

Bill of sale must be given by the true owner of chattels.

Sect. 5 of the Act of 1882 avoids, except as against the grantor, a bill of sale of chattels of which the grantor was not the "true owner" at the time of executing the bill of sale (*c*).

Meaning of "true owner."

The "true owner" of personal chattels within the meaning of sect. 5 includes the person who is the legal owner thereof at the time of the execution of the bill of sale, whether he is also the beneficial owner or only trustee for another (*d*).

(*t*) Per Lord Esher, M.R., in *Witt* v. *Banner*, 20 Q. B. D. 114, C. A. at p. 118.

(*u*) *Witt* v. *Banner*, *sup.* See, also, *Carpenter* v. *Deen*, 23 Q. B. D. 566; *Davies* v. *Jenkins*, (1900) 1 Q. B. 133.

(*x*) *Roberts* v. *Roberts*, 13 Q. B. D. 794.

(*y*) *Hickley* v. *Greenwood*, 25 Q. B. D. 277.

(*z*) *Davidson* v. *Carlton Bank*, (1893) 1 Q. B. 82, C. A.

(*a*) *Davies* v. *Jenkins*, (1900) 1 Q. B. 133.

(*b*) *Simmons* v. *Hughes*, 34 S. J. 659.

(*c*) *Ante*, p. 220.

(*d*) *Re Sarl, Exp. Williams*, (1892) 2 Q. B. 591.

A registered bill of sale by the equitable owner of goods which were in the possession of his trustee for sale, was held to be void (*e*).

So, also, where a bill of sale was given to secure an advance, and subsequently the grantor became bankrupt, and the grantee, in ignorance of the bankruptcy, took a second bill of sale in substitution for the first, it was held that, inasmuch as the grantor at that time had no interest or power over the goods, the second bill was utterly nugatory, and left the first bill unaffected (*f*).

Goods bought before, but received after, execution of a bill of sale, would be in the true ownership of the grantor, and have been held to pass if mentioned in the schedule (*g*).

Although sect. 5 seems to have been primarily aimed at assignments by debtors of future plant and stock in trade, the enactment clearly applies to other matters.

Thus, where chattels were assigned by way of absolute gift by a deed which, though unregistered, was not absolutely void, and the grantor subsequently executed another bill of sale to secure an advance which was registered; it was held that, at the time of the execution of the subsequent bill, the grantor was not the true owner of the goods, and, consequently, the bill was void except as against the grantor (*h*).

But a person who has given a bill of sale by way of security for an advance still has the equity of redemption of the goods, and remains the "true owner" thereof, so as to enable him to give a subsequent bill for the same goods (*i*).

On avoidance of a bill of sale for want of renewal, the grantor will thereupon become the true owner of the goods, so as to be able to give a fresh bill of sale thereon (*k*).

Joint owners.

A joint owner of goods is a "true owner thereof" to the extent of his interest (*l*). So, also, a partner in respect of the property of a firm (*m*).

Husband and wife.

A bill of sale was held to be valid which was given by a wife,

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(*e*) *Chapman* v. *Knight*, 5 C. P. D. 308. But see *Walrond* v. *Goldman*, 16 Q. B. D. 121.

(*f*) *Re Bargen, Exp. Hasluck*, (1894) 1 Q. B. 444.

(*g*) *Sutton* v. *Bath*, 1 F. & F. 152; *Sladden* v. *Sergeant*, 1 F. & F. 322.

(*h*) *Tuck* v. *Southern Counties Deposit Bank*, 42 Ch. D. 471, C. A.

(*i*) *Thomas* v. *Searles*, (1891) 2 Q. B. 408, C. A. See *Usher* v. *Martin*, 24 Q. B. D. 272.

(*k*) *Fenton* v. *Blythe*, 25 Q. B. D. 417.

(*l*) *Exp. Pratt, Re Field*, 63 L. T. 289.

(*m*) *Exp. Barnett, Re Tamplin*, 59 L. J. Q. B. 194.

without the concurrence of her husband, of goods which were in the house in which they both resided together, and which by ante-nuptial agreement belonged to the wife for her separate use (*n*).

By sect. 6 of the Act of 1882, it is enacted as follows:—

Exception as to growing crops and substituted fixtures.

"Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things; (that is to say)—

(1.) Any growing crops separately assigned or charged, where such crops were actually growing at the time when the bill of sale was executed.

(2.) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant or trade machinery specifically described in the schedule to such bill of sale."

Effect of this enactment.

The effect of this enactment is that bills of sale of growing crops though assigned separately from the land, and of substituted fixtures and trade machinery, are excepted out of the operation of the Act of 1882, so that such bills need not be in strict conformity with the statutable form prescribed by sect. 19 of that Act, and will, if duly registered, be valid as against not only the grantor but all other persons, though such property is not specifically described in a schedule as required by sect. 4, and though the grantor is not the true owner thereof at the time of the execution of the bill of sale as required by sect. 5.

Growing crops.

It would seem, however, that in order that crops may pass, there must be already the foundation of an interest in the grantor (*o*). Thus, before the Bills of Sale Acts, it was held that the future fruits of an estate might be granted by a person having an interest in the land (*p*); and that the next year's wool of sheep belonging to the grantor was capable of being assigned (*q*). If, however, there was a foundation of interest, it was not necessary that a grantor should actually be in possession of the property from which the produce assigned was to issue. So a security was held to extend to growing crops on a farm not

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(*n*) *Walrond* v. *Goldman*, 16 Q. B. D. 121.

(*o*) Bac. Max, Rule 14.

(*p*) *Grantham* v. *Hawley*, Hob. 132.

(*q*) Perkins, Pl. 90.

then occupied by the grantor (*r*), and to goods in a house afterwards built (*s*).

Right to growing crops after surrender by tenant.

After a bill of sale of growing crops by a tenant, the landlord and tenant agreed to a surrender of the tenancy; the legal title in the growing crops vested in the landlord, which the grantee under the bill of sale had no equity to displace, and the value of the crops being less than the cost of reaping and the rent due at the time of the surrender, under no view could the bill of sale holder claim anything (*t*).

Machinery.

Before the present Bills of Sale Acts it was held that machinery, substituted for machinery specifically assigned by way of mortgage, might be effectually included in the security (*u*).

Plant.

Horses of a cab proprietor are not "plant" within the meaning of sect. 6 (2) of the Act of 1882 (*x*).

ix.—Apparent Possession.—Section 4 of the Act of 1878 further enacts as follows :—

What is apparent possession.

> "Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving the bill of sale, so long as they remain in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

This question not material as to bills of sale by way of security.

This section is identical with sect. 7 of the Act of 1854, and the decisions as to apparent possession under the earlier Act appear to be still applicable. Inasmuch, however, as, by virtue of sect. 5 of the Act of 1882 (*y*), the validity of bills of sale given after the 1st November, 1882, by way of security, depends not upon apparent possession, but upon true ownership at the time of giving the bill, it is obvious that, except as regards bills so given before that date, and subsequently renewed, and as regards absolute bills of sale (the consideration of which is not material to the present purpose), the doctrine of apparent posses-

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(*r*) *Carr* v. *Allatt*, 27 L. J. Ex. 385.

(*s*) *Chidell* v. *Galsworthy*, 6 C. B. N. S. 471.

(*t*) *Clements* v. *Matthews*, 11 Q. B. D. 808, C. A.

(*u*) *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Leatham* v. *Amor*, 47 L. J. Q. B. 581; *Lazarus* v. *Andrade*, 5 C. P. D. 320.

(*x*) *London and Eastern Counties Loan, &c. Co.* v. *Creasey*, (1897) 1 Q. B. 768, C. A.

(*y*) See *ante*, p. 220.

sion is of no practical importance. The decisions on apparent possession will, therefore, be here very briefly noticed.

Avoidance of unregistered bills of sale.

Before the Act of 1882 came into operation, all bills of sale, whether given absolutely or by way of security, were required by sect. 8 of the Act of 1878 (*z*) to be registered within the time and in the manner prescribed; or, otherwise, such bills of sale were to be deemed to be fraudulent and void as against trustees and execution creditors of the persons whose goods were comprised in such bills of sale so far as regards chattels which, at the time of such person's bankruptcy or liquidation or process executed, and after seven days after the making of the bill of sale, were in the possession or the apparent possession of the person making the bill of sale.

Possession by grantee within seven days.

If, after any bill of sale, possession is taken by the grantee within the time prescribed by the Act, and retained, the case does not fall within the Act, and no registration is necessary, as there is not "apparent possession" within that time (*a*).

The occupation of the grantor must be an actual *de facto* occupation; his being a tenant of the premises, but residing elsewhere, is not sufficient (*b*); and wrongful possession takes the case out of the statute (*c*). The possession of the bailee of the grantor is the possession of the grantor (*d*).

Joint possession of husband and wife.

Where husband and wife are living together the law attributes possession to the person who has the legal title. So where furniture was assigned by a husband for valid consideration to a trustee for his wife's separate use, and the furniture remained in the joint possession of the husband and wife, the assignment was held not to fall within the Act, the possession being attributed to the wife (*e*).

Joint owners.

Where joint owners of chattels mortgage them by an unregistered bill of sale, and one becomes bankrupt, his moiety of the chattels at the date of the bill of sale alone passes to the trustee (*f*), though he had subsequently purchased the other moiety (*f*).

(*z*) This section is repealed by sect. 15 of the Act of 1882, but so as not to affect the validity of anything previously done.

(*a*) *Marples* v. *Hartley*, 3 E. & E. 610; *Hall* v. *Day*, 5 L. T. N. S. 398; *Hollingsworth* v. *White*, 6 L. T. N. S. 604, Q. B.; *Exp. Harris, inf.; Banbury* v. *White*, 2 H. & C. 300; *Minister* v. *Price*, 1 F. & F. 686.

(*b*) *Robinson* v. *Briggs*, L. R. 6 Ex. 1. See *Exp. Morrison, Re Westray*, 42 L. T. 158.

(*c*) *Exp. Fletcher*, 5 Ch. D. 809, C. A.

(*d*) *Ancona* v. *Rogers*, 1 Ex. D. 285.

(*e*) *Ramsay* v. *Margrett*, (1894) 2 Q. B. 18, C. A.; *Re Satterthwaite*, 2 Mans. 52.

(*f*) *Exp. Brown, Re Reed*, 9 Ch. D. 389, C. A.

Growing crops.

Where a purchaser of growing crops had taken charge and employed labourers of his own to tend and cultivate them, the land remaining in the possession of the vendor, it was held that enough had been done to take the goods out of the apparent possession of the vendor (*g*).

Grantor manager.

Where the grantor was manager of the business and used the furniture comprised in the bill of sale as part of his salary, the goods were held to be in his apparent possession (*h*). If a purchaser lets the chattels to the vendor without change of possession, the case falls within the Acts.

Man in possession.

When the debtor and his family were allowed the use of the goods, they were held to be in his apparent possession (*i*), although a man was formally in possession for the grantee (*k*). It was otherwise where the goods were under the control of the man in possession, who was there to see that the use was in accordance with the rights of the bill of sale holders (*l*).

To satisfy the Bills of Sale Acts, the possession must be apparent as well as real (*l*); but under the order and disposition clause in bankruptcy, a real possession, even though it be friendly, is sufficient (*m*); and where some part of the grantor's family only was left in possession, the delivery was held complete (*n*).

Other acts of taking possession.

By packing up to send away, the grantee takes possession within the Act (*o*). An advertisement for sale by the grantee in possession, though in the house of the grantor, was sufficient possession in the former (*p*); but a placard for sale, not specifying for whom, amounted to nothing (*n*).

Demand insufficient.

Actual possession must be taken by the grantee; a demand, accompanied by a threat to take the goods by force, will not be sufficient (*q*); the effect of such demand is different under the reputed ownership clause in bankruptcy, for after demand the

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(*g*) *Gough* v. *Everard*, 2 H. & C. 1; doubting *Sheridan* v. *McCartney*, 11 Ir. Com. L. R. 506.

(*h*) *Pickard* v. *Marriage*, 1 Ex. D. 364; *Preston* v. *Lamont*, 1 Ex. D. 361; *Lincoln Wagon Co.* v. *Mumford*, 41 L. T. 655.

(*i*) *Exp. Jay*, L. R. 9 Ch. 697.

(*k*) *Exp. Hooman*, L. R. 10 Eq. 63; *Exp. Lewis*, L. R. 6 Ch. 626; *Exp. Mutton*, L. R. 14 Eq. 178; *Seal* v. *Claridge*, 7 Q. B. D. 516, C. A.; *Exp. Mortlock*, W. N. (1881) 161.

(*l*) *Re Francis*, 10 Ch. D. 408, 414, C. A.

(*m*) *Re Francis*, 10 Ch. D. 408, C. A.

(*n*) *Davies* v. *Jones*, 10 W. R. 779.

(*o*) *Exp. Jay*, L. R. 9 Ch. 697.

(*p*) *Emanuel* v. *Bridger*, L. R. 9 Q. B. 286.

(*q*) *Ancona* v. *Rogers*, 1 Ex. D. 285. See *Exp. Conning*, L. R. 16 Eq. 414.

goods cannot be said to be in the possession of the debtor with the consent of the true owner (the creditor) (*r*).

Where a bill of sale holder put a man in possession of the grantor's premises and advertised his goods for sale, but allowed the grantor to remain in the house, it was held that this amounted to taking actual possession of the goods (*s*).

Possession of sheriff.

Possession of the sheriff under an execution by the grantee or a third person at the time of filing the petition for bankruptcy, takes the case out of the statute (*t*), although the name of the grantor, with that of another person, is on the door of the workshop (*t*). So, also, it would seem, possession by a receiver (*u*).

Where the holder of an unregistered bill of sale seized the goods comprised therein, and afterwards sold them *bonâ fide* to the son of the grantor, in whose home the grantor lived, it was held that the bill of sale being satisfied and gone, the Bills of Sale Act did not apply, and that the goods were not in the apparent possession of the grantor so as to render them liable to seizure by an execution creditor (*x*).

x.—Power of Seizure.—By sect. 7 of the Act of 1882, it is enacted as follows :—

Bill of sale with power to seize, except in certain events, to be void.

"Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

(1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security;

(2.) If the grantor shall become a bankrupt or suffer the said goods, or any of them, to be distrained for rent, rates, or taxes;

(3.) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

(4.) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes;

(5.) If execution shall have been levied against the goods of the grantor under any judgment at law;

(*r*) *Brewin* v. *Short*, 1 Jur. N. S. 798; *Exp. North-Western Bank*, L. R. 15 Eq. 69; *Exp. Harris*, L. R. 8 Ch. 48; *Exp. Ward*, L. R. 8 Ch. 144.

(*s*) *Smith* v. *Wall*, 18 L. T. N. S. 182.

(*t*) *Exp. Saffery*, 16 Ch. D. 668, C. A.; *Re Eales*, 54 W. R. 202.

(*u*) *Taylor* v. *Eckersley*, 5 Ch. D. 740.

(*x*) *Swire* v. *Cookson*, 49 L. T. 736, C. A.

Provided that the grantor may, within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such Court or judge, if satisfied that, by payment of money or otherwise, the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just."

Effect of this section.

This section incorporates into every bill of sale an implied power of seizure in any of the events mentioned (*y*). But an express power to seize the chattels may be inserted in a bill of sale, provided such power does not purport to be exerciseable in any event not specified in the section (*z*), and if the bill contains a proviso that there shall be no seizure for any cause other than those mentioned in the section (*a*).

Sect. 7 applies to goods seized after the commencement of the Act under a bill of sale registered before the Act (*b*).

If the bill expressly or impliedly provides for the seizure of the goods for any cause other than those specified in sect. 7, the bill will be void (*c*); and in that case the proviso will not save the bill (*d*).

(1) Default in payment.

The default in payment giving rise to the power of seizure must be default "in payment at the time provided" by the bill of sale. A power to seize in default of payment on demand (*e*), or within a specified time after demand (*f*), will avoid the bill.

Default in payment of capitalized interest cannot be made enforceable by seizure (*g*).

The power will be exerciseable on default in payment of any one instalment, though the bill contain no express provision to that effect (*h*).

Default in performance of covenants necessary for maintaining the security.

It would seem that the power of seizure, being by sect. 7 made exerciseable on default in performance of a covenant necessary for maintaining the security, will not be exerciseable

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(*y*) *Watkins* v. *Evans*, 18 Q. B. D. 386, C. A.

(*z*) *Exp. Official Receiver, Re Morritt*, 18 Q. B. D. 222, C. A.

(*a*) *Duff* v. *Valentine*, W. N. (1883) 225. See *Thomas* v. *Kelly*, 13 App. Ca. at p. 519; *Re Bullock, inf.*

(*b*) *Exp. Cotton*, 11 Q. B. D. 301.

(*c*) *Davis* v. *Burton*, 11 Q. B. D. 537, C. A. See *Re Bullock, inf.*

(*d*) *Re Williams, Exp. Pearce*, 25 Ch. D. 656.

(*e*) *Hetherington* v. *Groome*, 13 Q. B. D. 789, C. A. But see *Re Bullock, Exp. Ward*, (1899) 2 Q. B. 517.

(*f*) *Bishop* v. *Beale*, 1 T. L. R. 140; *Clemson* v. *Townsend*, 1 C. & E. 418. See *Sibley* v. *Higgs*, 15 Q. B. D. 619. And see further on this point, *post*, p. 250.

(*g*) *Davis* v. *Burton*, 11 Q. B. D. 537, C. A.

(*h*) *Re Wood, Exp. Woolfe*, (1894) 1 Q. B. 605.

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on default in observance of a negative covenant (*i*). And possibly an attempt to make an express power so exerciseable might be held to vitiate the bill.

Covenants to pay rates, rent, taxes, &c. (*k*), to pay insurance premiums and produce receipts (*l*), to repair or replace chattels (*m*), have been held to be covenants necessary for maintaining the security, on the breach of which the power of seizure will arise.

The statutory form permits the insertion of terms which the parties may agree upon for "maintenance of the security" (*n*), but such agreement will not make the terms "necessary" if they really are not so (*o*); and an attempt to extend the power of seizure to breach of any such agreed terms as are not necessary will vitiate the bill (*p*).

(2) Bankruptcy,

The words in a bill of sale, "if the grantor shall do or suffer any matter or thing whereby he shall become a bankrupt," were held to be substantially the same as "if the grantor shall become a bankrupt," and to be within sect. 7, cl. 2 (*q*).

For the purposes of the Bankruptcy Act, 1890, the word "bankrupt" is thereby meant to include a compounding or arranging debtor (*r*); but a composition or scheme of arrangement, would not, it seems, give rise to the power of seizure under this section (*s*).

The mere commission of an act of bankruptcy without adjudication will apparently not be sufficient (*s*).

If the grantor becomes bankrupt after seizure, the trustee in bankruptcy can only redeem by paying the whole amount owing on the bill of sale (*t*).

or distraint for rent, &c.

A landlord's right to distrain is paramount to a bill of sale. But some things are not distrainable at common law, viz., fixtures, things delivered to a person to be carried or worked in the way of his trade or business, cocks or sheaves of corn, things

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(*i*) *Hyde* v. *Warden*, 3 Ex. D. 72.

(*k*) *Turner* v. *Culpan*, 58 L. T. 340; W. N. (1888) 225.

(*l*) *Hammond* v. *Hocking*, 12 Q. B. D. 291; *Duff* v. *Valentine*, W. N. (1888) 225; *Watkins* v. *Evans*, 18 Q. B. D. 386, C. A.

(*m*) *Consolidated Credit Corporation* v. *Gosney*, 16 Q. B. D. 24; *Furber* v. *Cobb*, 18 Q. B. D. 494, C. A.

(*n*) See *post*, p. 247.

(*o*) *Furber* v. *Cobb*, *sup.* at pp. 505, 506.

(*p*) *Bianchi* v. *Offord*, 17 Q. B. D. 484; *Real and Personal Advance Co.* v. *Clears*, 20 Q. B. D. 304, C. A.

(*q*) *Exp. Allam, Re Munday*, 14 Q. B. D. 43.

(*r*) 53 & 54 Vict. c. 71, s. 3 (16), (17).

(*s*) *Gilroy* v. *Bowey*, 59 L. T. 223.

(*t*) *Re Wood, Exp. Woolfe*, (1894) 1 Q. B. 605.

in actual use, and things in the custody of the law; also, provided there is sufficient distress besides, beasts of the plough and instruments of husbandry, and the instruments of a man's trade or profession (*u*).

By sect. 13 of the Act of 1882, chattels seized are to remain on the premises, and not to be removed or sold until after the expiration of five clear days from the day of seizure. During this period such of the chattels as are distrainable will continue liable to distraint. But the holder of a bill of sale may, with the consent of the grantor, remove the chattels either before seizure (*x*), or within the five days thereafter (*y*); and thereupon the chattels will become the property of the holder so as to exclude the operation of the statute 11 Geo. II. c. 19, by which landlords are empowered to follow goods fraudulently removed, or recover double value; nor will the landlord have any right of action in respect of such removal.

It seems that a landlord who has distrained is not bound to hand over any surplus chattels, or proceeds of sale thereof, to the holder of a bill of sale of which he has received notice after distraint (*z*).

Where a grantee of a bill of sale, at the request of the grantor, paid out the landlord, who had distrained, and the grantor failed to repay to the grantee the amount so paid, the grantee was allowed to seize and sell the chattels comprised in the bill of sale (*a*).

As a general rule, a grantee who has paid out a distraining landlord is entitled to be reimbursed by the grantor the money so paid (*b*).

If a landlord distrains chattels, part of which are and part are not comprised in a bill of sale, the holder may require the goods not so comprised to be first applied in payment of the rent (*c*).

A bill of sale holder who delays taking possession of chattels till after expiration of the lease of the premises in which the

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(*u*) See Byth. & Jarm. Conv. vol. 3, pp. 170 *et seq.* (4th ed.); Reed on Bills of Sale Acts (10th ed.), p. 111.

(*x*) *Thornton* v. *Adams*, 5 M. & S. 38; *Bach* v. *Meats*, 5 M. & S. 200; *Fletcher* v. *Marillier*, 9 A. & E. 457.

(*y*) *Tomlinson* v. *Consolidated Credit Corporation*, 24 Q. B. D. 135, C. A.

(*z*) *Evans* v. *Wright*, 2 H. & N. 527.

(*a*) *Cowley* v. *Tyler*, W. N. (1884) 77.

(*b*) *Edmunds* v. *Wallingford*, 14 Q. B. D. 811, C. A., questioning *England* v. *Marsden*, L. R. 1 C. P. 529; *The Orchis*, 15 P. D. 38, C. A.

(*c*) *Exp. Stephenson*, De G. 586. See Agricultural Holdings Act, 1908, s. 29.

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chattels are, may be treated as a trespasser, and restrained from holding or selling the chattels (*d*).

Distress for taxes or rates.

By sect. 14 of the Act of 1882, a bill of sale within that Act is no protection against distress under a warrant for taxes or rates (*e*). Where a local authority took proceedings for the recovery of rates levied under the Public Health Act, 1875 (*f*), in the County Court under sect. 261 of that Act, instead of by distress warrant under sect. 256, it was held that sect. 14 did not apply, and that the grantee of a bill of sale on the goods was protected (*g*).

(3) Fraudulent removal.

The question whether a removal is fraudulent or not is a question of fact (*h*).

It would seem that, if a bill of sale comprises articles likely to be destroyed or injured by removal, an unqualified covenant not to remove the chattels without the consent of the grantee may be deemed a covenant "necessary for the maintenance of the security" within clause (1) of this section, so as, on breach thereof, to give the grantee a right to seize the chattels (*i*). But, as a rule, a covenant not to remove goods without the consent of the grantee gives no power of seizure on breach of the covenant (*k*).

(4) Non-production of receipts for rent, &c.

Goods can only be seized under a bill of sale on the ground of failure to produce receipts, if such failure is without reasonable excuse (*l*).

Where rent has been due only a few days, and the landlord has not yet required payment, this is a reasonable excuse for non-production of the last receipt (*m*).

A demand in writing for a receipt to be sent by post is not a demand in writing to produce the receipt within the meaning of the Act (*n*).

(5) Execution.

Where a judgment debtor, after seizure under an execution of goods claimed by the holder of a bill of sale, and after an interpleader order had been made, filed a liquidation petition, it was

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(*d*) *Smith* v. *Brown*, 48 L. J. Ch. 694. See also *Clements* v. *Matthews*, 11 Q. B. D. 808, C. A., *ante*, p. 227.

(*e*) *Richards* v. *Kidderminster*, (1896) 2 Ch. 212.

(*f*) 38 & 39 Vict. c. 55.

(*g*) *Wimbledon Local Board* v. *Underwood*, (1892) 1 Q. B. 836.

(*h*) *John* v. *Jenkins*, 1 Cr. & M. 227.

(*i*) *Furber* v. *Cobb*, 18 Q. B. D. at pp. 503, 504; *Seed* v. *Bradley*, (1894) 1 Q. B. 319, C. A.; *Exp. Payne, Re Coton*, 56 L. T. 571; *Re Paxton, Exp. Pope*, 60 L. T. 428.

(*k*) *Topley* v. *Corsbie*, 20 Q. B. D. 350.

(*l*) *Weardale Coal and Iron Co.* v. *Hodson*, (1894) 1 Q. B. 598, C. A.

(*m*) *Exp. Cotton*, 11 Q. B. D. 301; *Exp. Wickens*, *inf.*

(*n*) *Exp. Wickens*, (1898) 1 Q. B. 543, C. A.; and see *Re Bullock, Exp. Ward*, (1899) 2 Q. B. 517.

held that the trustee in the liquidation was entitled to the goods subject to the claim of the bill of sale holder (o).

But where an interpleader order is made, a claimant under a bill of sale is not entitled to demand from the sheriff any sum not included in the particulars of claim (p).

As to the meaning of the word "judgment," see the cases cited below (q).

Proviso as to restraining grantee from seizing goods.

The powers of the Court under this proviso are discretionary (r), but will not generally be exercised except on the grantor bringing into Court the amount claimed by the grantee (s); unless, in the opinion of the Court, the grantee is acting unreasonably (t).

So it would seem that, if the seizure is on the ground of fraudulent removal of the goods, they must be replaced on the premises, so that the cause of seizure may no longer exist, before the grantor can seek relief (t).

There is, however, no power to grant relief where the grantee has seized, not for the purpose of realizing, but for the purpose of maintaining the security (u).

The application for an injunction should be by summons, supported by an affidavit of the facts; but the Court will not grant even an interim injunction unless the facts raise a *primâ facie* inference that the cause of seizure no longer exists (x); and an interim injunction will only be granted until a day fixed (x).

By sect. 13 of the Act of 1882 it is enacted, that—

When chattels may be removed or sold.

> "All personal chattels seized, or of which possession has been taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or taken possession of."

Removal to prevent distress.

Where the holder of a bill of sale seized the chattels and, with the consent of the grantor, removed them within five days after seizure with a view to preventing the landlord distraining upon them, it was held that the landlord had no cause of action under this section for the removal of the goods, and that, inasmuch as the goods were the property of the holder of the bill of sale and not of the grantor, an action for double value under 11 Geo. II. c. 19, s. 3, would not lie for a removal (*y*).

(o) *Exp. Halling, Re Haydon*, 7 Ch. D. 157, C. A.

(p) *Hockey* v. *Evans*, 18 Q. B. D. 390, C. A.

(q) Judicature Act, 1873 (37 & 38 Vict. c. 66), s. 100; R. S. C. 1883, Ord. XLII. rr. 17, 24. But see *Cremetti* v. *Crom*, 4 Q. B. D. 225; *Exp. Schmitz, Re Cohen*, 12 Q. B. D. 509.

(r) *Exp. Cotton*, 11 Q. B. D. 301; *Hickson* v. *Darlow*, 23 Ch. D. 690.

(s) *Hill* v. *Kirkwood*, 42 L. T. 105.

(t) *Hickson* v. *Darlow*, 23 Ch. D. 690.

(u) *Exp. Ellis*, (1898) 2 Q. B. 79, C. A.

(x) *Payne* v. *Fern*, 6 Q. B. D. 620.

Goods seized in public highway.

Where a horse and cab, which were comprised in a bill of sale, were seized by a grantee in a public street and taken by him to his own yard where he kept them for five days, it was held that the grantee had reasonably complied with the requirements of this section, and that the grantor could not recover damages for wrongful seizure (*z*).

Rights of grantor after removal.

After the expiration of the five days the grantor cannot maintain trespass for removal of the goods, for he has no longer the present possession, actual or constructive, nor any legal right to possession; but, until the goods are actually sold, he still has an equitable right to redeem them, and may claim damages for any injury done to the goods in removing them (*a*).

41 & 42 Vict. c. 31, s. 8.

xi.—Statement of Consideration.—By sect. 8 of the Act of 1878, it was provided that every bill of sale should set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against trustees or assignees in bankruptcy or liquidation, or under any creditor's trust deed, and as against execution creditors, should be deemed fraudulent and void.

Repeal.

This section was repealed by sect. 15 of the Act of 1882, so far as relates to bills of sale given by way of security executed since the commencement of the repealing Act, but not so as to affect the validity of anything done or suffered before that date (*b*).

45 & 46 Vict. c. 43, s. 8.

By sect. 8 of the Act of 1882, it is provided that every bill of sale "shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

Distinction between

The effect of the two enactments is different. Under the

(*y*) *Tomlinson* v. *Consolidated Credit Corp.*, 24 Q. B. D. 135, C. A. See *Lane* v. *Tyler*, 56 L. J. Q. B. 461.

(*z*) *O'Neill* v. *City Finance Co.*, 17 Q. B. D. 234.

(*a*) *Johnson* v. *Diprose*, (1893) 1 Q. B. 512, C. A.

(*b*) 1st November, 1882. As to the extent of the repeal, see *Swift* v. *Pannell*, 24 Ch. D. 210; *Hall* v. *Smith*, W. N. (1887) 170; *Exp. Izard, Re Chapple*, 23 Ch. D. 409, C. A.

effects of these enactments.

former Act, the effect was to avoid a bill of sale which untruly stated the consideration only as against the persons specified in sect. 8 of that Act, but to leave it valid and binding as between grantor and grantee; but under the present enactment such a bill is absolutely void even as between parties themselves in respect of the personal chattels comprised therein. But though so far void, a covenant to repay the sum advanced will remain unaffected (*c*).

Misstatement of consideration.

Under sect. 8 of the Act of 1878, it has been repeatedly held that, if the consideration be not truly stated, the bill of sale, however honest, will be void (*d*).

The deed was held void in the following cases:—

Where the consideration was stated to be 120*l*., when really 30*l*. was for interest and expenses, though the attestation clause was followed by a receipt which stated the consideration correctly. Something was kept back for interest which could not be due, and the receipt was not part of the deed (*e*):

Where 700*l*. was the consideration stated, but 7*l*. 10*s*. was retained for commission on the loan and expenses, and not stated (*f*):

Where part of the consideration was money to be paid at a future day to the landlord for rent not due at the date of the deed, but not stated (*g*):

Where the alleged consideration was "312*l*. now owing," but in fact 126*l*., part of that amount, represented the liability of the grantee in respect of certain current bills accepted by him for the accommodation of the grantor, which were, in fact, afterwards paid by the grantee pursuant to arrangement (*h*):

Where the consideration money was stated to be "now paid," but part of the advance consisted of bills of exchange payable twelve months after date (*i*); so also where part was retained by the grantee to meet running acceptances and to defray certain

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(*c*) *Heseltine* v. *Simmons*, (1892) 2 Q. B. 547; cf. *Davies* v. *Rees*, 17 Q. B. D. 408, *post*, p. 240.

(*d*) *Exp. Carter*, 12 Ch. D. 908; *Exp. Nat. Merc. Bank*, *Re Haynes*, 15 Ch. D. 42, C. A.; *Exp. Ord*, W. N. (1881) 30, C. A.

(*e*) *Exp. Charing Cross Bank*, *Re Parker*, 16 Ch. D. 35, C. A.

(*f*) *Hamilton* v. *Chaine*, 7 Q. B. D. 319, C. A. See *Exp. Firth*, *Re Cowburn*, 19 Ch. D. 419, C. A.; *Exp. Challinor*, *Re Rogers*, 16 Ch. D. 260, C. A.

(*g*) *Exp. Rolph*, *Re Spindler*, 19 Ch. D. 98, C. A.

(*h*) *Mayer* v. *Mindlevich*, 59 L. T. 400. See *Darlow* v. *Bland*, (1897) 1 Q. B. 125.

(*i*) *Re Moore*, *Exp. Off. Rec.*, 4 Mans. 51.

agreed expenses (*k*). So also the consideration is untruly stated where a sum made up of a past debt and a present further advance is stated as now due and owing (*l*).

If any sum be retained by the grantee, even by agreement with the grantor, the fact must be stated. But if the money is by agreement retained in satisfaction of a liability to a third person, the intended application of the money need not be stated, nor is it material in such case that the debt was not yet due (*m*).

What statement is sufficient.

On the other hand, it is sufficient if the consideration is honestly and substantially stated, so as to show the true nature of the transaction (*n*).

A mere clerical error or slight inaccuracy in the statement will not avoid a bill of sale which is in other respects in conformity with the Acts (*o*), if it sufficiently appears from the deed what the consideration really was (*p*).

A statement that the consideration was "32*l*. or thereabouts," was held to be sufficient (*q*).

The consideration may be stated to be partly made up of the charges of the grantee's solicitor for preparing the bill (*r*).

A solicitor acting for both grantor and grantee may, with the consent of the grantor, retain part of the consideration for costs of and incident to the transaction without that fact being mentioned in the bill (*s*).

A collateral agreement for the application of the money need not be stated, nor are recitals of the object and motive required (*t*).

Meaning of "consideration."

The word "consideration" means that which is in law the consideration for the giving of the instrument, not the sum secured by it (*u*). The consideration was held to be truly stated to be money lent, though it was a balance due on a statement

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(*k*) *Richardson* v. *Harris*, 22 Q. B. D. 268, C. A.

(*l*) *Davies* v. *Jenkins*, (1900) 1 Q. B. 133.

(*m*) *Re Wiltshire, Exp. Eynon*, (1900) 1 Q. B. 96.

(*n*) *Roberts* v. *Roberts*, 13 Q. B. D. 794, C. A.

(*o*) *Exp. Winter, Re Fothergill*, 44 L. T. 323; 29 W. R. 575, C. A.

(*p*) *Roberts* v. *Roberts*, *supra*; *Collis* v. *Tuson*, 46 L. T. 387.

(*q*) *Hughes* v. *Little*, 18 Q. B. D. 32, C. A.

(*r*) *Cohen* v. *Higgins*, 8 T. L. R. 8.

(*s*) *Exp. Hunt, Re Cann*, 13 Q. B. D. 36. See *Hamlyn* v. *Betteley*, 5 C. P. D. 327.

(*t*) *Exp. National Mercantile Bank, Re Haynes*, 15 Ch. D. 42, C. A. See *Hamlyn* v. *Betteley*, 5 C. P. D. 327; *Thomas* v. *Searles*, (1891) 2 Q. B. 408, C. A.; *Re Wiltshire*, (1900) 1 Q. B. 96.

(*u*) *Exp. Challinor, Re Rogers*, 16 Ch. D. 260, C. A.

of account (*x*). So, where the consideration was stated to be 400*l*. paid, although 200*l*. of it had been paid a few days before (*y*).

So, where a bill of sale purported to be given in consideration of "1,500*l*. now paid," but in fact the amount had been previously advanced and paid to the grantor on the security of a bill which was discovered, before registration, not to be in conformity with the Bills of Sale Acts, and which was accordingly cancelled, the consideration for the bill was held to be truly stated (*z*).

An agreement not to register, whereby the bonus was increased, is no part of the consideration, nor is it a condition or defeasance (*a*).

In a bill of sale given by a purchaser to a vendor to secure the balance of purchase-money, the statement of the consideration as cash paid was held sufficient (*b*). A bill of sale stated the consideration to be in order to induce the grantee not to institute proceedings against him. No proceedings had been threatened; the consideration was held to be sufficiently stated (*c*). So, where the consideration was stated to be in part a covenant by the grantees, and no such covenant was contained in the bill of sale (*d*).

Bill of sale under 30*l*. to be void.

By sect. 12 of the Act of 1882, "every bill of sale made or given in consideration of any sum under 30*l*. shall be void" (*e*).

xii.—Form of Bill of Sale under the Act of 1882.—By sect. 9 of this Act it is enacted that—

Form of bill of sale.

> "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

Bills of sale not in accordance with statutable form avoided.

Although this section does not make imperative a literal conformity with the statutable form, it enacts not only what a bill

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(*x*) *Credit Co.* v. *Pott*, 6 Q. B. D. 295, C. A.

(*y*) *Exp. Johnson, Re Chapman*, 26 Ch. D. 338.

(*z*) *Exp. Allam, Re Munday*, 14 Q. B. D. 43. See *Exp. Nelson, Re Hockaday*, W. N. (1887) 7; 55 L. T. 819, C. A.; *Re Davies, Exp. Equitable Investment Co.*, 77 L. T. 567.

(*a*) *Exp. Popplewell, Re Storey*, 21 Ch. D. 73, C. A.

(*b*) *Exp. Bolland, Re Roper*, 21 Ch. D. 543, C. A.

(*c*) *Exp. Winter, Re Fothergill*, 29 W. R. 575, C. A.

(*d*) *Roberts* v. *Roberts*, 13 Q. B. D. 794, C. A.

(*e*) *Darlow* v. *Bland*, (1897) 1 Q. B. 125; *post*, p. 243.

of sale must contain, but also what it must not contain, and renders void any bill which departs from the form in any material and substantial particular (*f*). The result is, that all bills of sale given as security for money are prohibited to which the statutable form is inappropriate (*g*). And, accordingly, licences to seize goods, inventories, receipts, powers of attorney, and other instruments falling within the definition of a "bill of sale" given by sect. 4 of the Act of 1878 (*h*), but incapable from their nature of being framed so as to be "in accordance with" the statutable form, are no longer available as securities for money (*i*).

If a bill of sale is not in accordance with the statutable form, the defect cannot be remedied by statements in the affidavit filed on the registration, or by other evidence (*k*). But a verbal omission may be remedied where the meaning is plain on the construction of the context, as where the word "pounds" was omitted in the covenant to repay (*l*).

Bill of sale by way of indemnity to surety.

It makes no difference whether the money sought to be secured is payable by the grantor in respect of a loan or of any other transaction; as, for instance, where a bill of sale is given to secure any moneys which the grantee may be called on to pay in respect of a guarantee given at the request of the grantor (*m*).

Extent of avoidance.

A bill of sale which does not conform to the requirements of this section is void as against all persons, including the grantor himself (*n*). It is also void and altogether inoperative, not merely as regards the personal chattels comprised therein, but as to every part thereof, so that a covenant contained in it for payment of principal and interest thereon intended to be secured upon the chattels is also rendered void (*o*).

Severance of security.

A single deed may contain distinct and severable contracts or obligations; if so, it may be valid as a security so far as relates

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(*f*) *Thomas* v. *Kelly*, 13 App. Ca. 506. See also *Exp. Stanford, Re Barber*, 17 Q. B. D. 259, C. A. *Kelly* v. *Kellond*, 20 Q. B. D. 569, C. A.

(*g*) *Thomas* v. *Kelly*, *sup.* at p. 511, per Lord Halsbury, C.

(*h*) See *ante*, p. 210.

(*i*) *Exp. Parsons, Re Townsend*, 16 Q. B. D. 532, C. A.

(*k*) *Bird* v. *Davey*, (1891) 1 Q. B. 29, at p. 31, C. A.

(*l*) *Mourmand* v. *Le Clair*, (1903) 2 K. B. 216.

(*m*) *Hughes* v. *Little*, 18 Q. B. D. 32, C. A.; *Re Hill, Exp. Off. Rec.*, 2 Mans. 208.

(*n*) *Thomas* v. *Kelly*, 13 App. Ca. at p. 511.

(*o*) *Davies* v. *Rees*, 17 Q. B. D. 408, C. A., at p. 412, per Bowen L.J.; *Smith* v. *Whiteman*, (1909) 2 K. B. 437. See *Griffin* v. *Union Deposit Bank*, 3 T. L. R. 608.

to land or other property not being "personal chattels" within the meaning of the Bills of Sale Acts, though non-conformity with the statutable form will render it void so far as regards any part of the instrument which appears as an integral part of a bill of sale in the schedule form (*p*).

Inclusion of other property.

Whether the inclusion in a single deed of such other property with personal chattels will of itself constitute a departure from the statutable form, so as to avoid the security as to the personal chattels, does not appear to have been expressly decided. It is conceived that such would be the result, even if the assignments of the several kinds of property be kept separate and distinct, on the ground that such inclusion would tend to render the deed less simple and intelligible, and to materially alter the legal effect of the instrument. It has been held that if personal chattels and real property are comprised in a single assignment, and scheduled together, that of itself constitutes a departure from the statutable form of a bill of sale, which will vitiate the instrument as regards the personal chattels (*q*). But where the schedule comprised personal chattels and also title deeds, it was held that the deeds were granted as personal chattels severed from the land, and therefore the bill of sale was not void (*r*).

Description of parties.

The form requires the names and addresses of the grantor and grantee respectively to be stated, but does not require the parties to be otherwise particularly described. Ambiguity of description of the grantee, if not misleading and if capable of ascertainment without the aid of extrinsic evidence, will not avoid a bill of sale (*s*).

Misdescription of grantor's name.

Indeed, in one case it was held that a bill of sale was valid where the grantor's christian name was misstated in a bill of sale which was executed by him under such false name for the purpose of concealing the fact that he had given a bill of sale (*t*).

(*p*) *Re Burdett, Exp. Byrne*, 20 Q. B. D. 310, C. A. See also *Stevens* v. *Marston*, 39 W. R. 129, C. A.; *Re Bansha, &c. Co.*, 21 L. R. Ir. 181.

(*q*) *Cochrane* v. *Entwisle*, 25 Q. B. D. 116, C. A.

(*r*) *Swanley Coal Co.* v. *Denton*, (1906) 2 K. B. 873, C. A.

(*s*) *Simmons* v. *Woodward*, (1892) A. C. 100; *Dolcini* v. *Dolcini*, (1895) 1 Q. B. 898.

(*t*) *Downes* v. *Salmon*, 20 Q. B. D. 775. See *Exp. McHattie, Re Wood*, 10 Ch. D. 398, C. A.; *Central Bank of London* v. *Hawkins*, 60 L. T. 901. And see *post*, p. 261. A deed will not, generally, be invalidated by reason of its being executed by a party under an assumed name, no fraud being intended. See *Leigh* v. *Leigh*, 15 Ves. 100; 10 R. R. 31; *Davies* v. *Lowndes*, 2 Sc. 103; *Doe* v. *Yates*, 5 B. & Al.

Address of grantee.

The omission of the address of the grantee renders a bill of sale void even where the grantee is a limited company, the name of which alone is sufficient for purposes of identification (*u*).

Trustee for grantee.

It seems that a bill of sale cannot be given to a trustee (*x*); but it was held under the Bills of Sale Act, 1854, that a bill of sale might be taken in the name of a trustee for the person who actually advanced the money, though the trust did not appear on the face of the instrument (*y*).

Company.

A bill of sale may be given or taken in the incorporated name of a company (*z*). But a mortgage or charge created by an instrument which, if executed by an individual, would require registration as a bill of sale, must be registered under the Companies Act, 1908, s. 93.

Several mortgagees.

Though the payment of a single debt may apparently be secured to several persons jointly by a bill of sale (*a*), yet an attempt to secure several distinct sums payable to separate creditors by one bill of sale will invalidate the instrument (*b*).

Several mortgagors.

Whether a bill of sale can be given by partners seems to be open to question (*c*). Where by a bill of sale two persons jointly and severally assigned goods to secure an advance, but the goods did not any of them belong to the grantors jointly, but some belonged to one and the rest to the other, the bill was held void (*d*).

Recitals

The statutable form does not contain any recitals or expressly permit their insertion in a bill of sale. But recitals may be inserted, if necessary, to explain the nature of the transaction or the intention of the parties (*e*).

Undue prolixity of recitals may of itself vitiate a bill of sale for securing a payment of money, as involving a departure from the "simplicity" of the statutable form (*f*).

544; *Re Matthews*, 16 Beav. 245; *Re James*, 5 Exch. 310; *Re Dearden*, 5 Exch. 740.

(*u*) *Altree* v. *Altree*, (1898) 2 Q. B. 267.

(*x*) *Melville* v. *Stringer*, 13 Q. B. D. 392, per Bowen, L. J., approved (1902) 1 K. B. 472.

(*y*) *Robinson* v. *Collingwood*, 17 C. B. N. S. 777.

(*z*) *Re Cunningham & Co., Attenborough's Case*, 28 Ch. D. 682. See *Shears* v. *Jacob*, L. R. 1 C. P. 513.

(*a*) *Maughan* v. *Sharpe*, 17 C. B. N. S. 443.

(*b*) *Melville* v. *Stringer*, 13 Q. B. D. 392, C. A. But see *Re Smith, Exp. Tarbuck*, 72 L. T. 59.

(*c*) *Saunders* v. *White*, (1902) 1 K. B. 472, C. A.

(*d*) *Ibid.*

(*e*) *Roberts* v. *Roberts*, 13 Q. B. D. 794, C. A.; *Exp. Stanford, Re Barber*, 17 Q. B. D. at pp. 269, 270, per Bowen, L. J.

(*f*) *Exp. Stanford, Re Barber*, 17 Q. B. D. 259, C. A., at p. 274, per Fry, L. J.

Considera-tion.

Sect. 9 of the Act of 1882 deals only with the form of the instrument, and though the statutable form prescribes that the consideration shall be stated, an untrue statement thereof does not constitute a deviation from the form, so as wholly to invalidate the instrument on that ground, but only renders it void "in respect of the personal chattels comprised therein" by virtue of sect. 8 of the same Act (*g*). But where a condition is part of the bargain of a bill of sale, but is not contained in it, the condition will wholly avoid the deed as being not in accordance with the form (*h*).

By sect. 12 of the same Act, every bill of sale made or given in consideration of any sum under 30*l*. shall be void (*i*).

Assignment.

The introduction into the assignment of the words "as beneficial owner" will avoid a bill of sale, as being an attempt to incorporate, by virtue of sect. 7, para. (c), of the Conveyancing, &c. Act, 1881, the covenant for immediate possession by the grantee on default and quiet enjoyment thereafter contained in that section, and thereby to alter the legal rights of the parties from the rights which the form gives, having regard to the provisions of sect. 13 of the Bills of Sale Act, 1882 (*k*).

Description of chattels assigned.

The statutable form requires a present assignment of specific chattels to be described in the schedule annexed to the bill of sale, and to be registered therewith (*l*).

Specific description means description with such particularity as is used in a business inventory of chattels (*m*).

If the specific description of the chattels contained in such schedule is sufficient for identification of the chattels, reference in the schedule to an unregistered catalogue will not restrict the description so as to avoid the bill (*n*).

The omission to state in the schedule the place where the chattels are located has been held not to vitiate the bill (*o*).

An attempt to include in the assignment after-acquired chattels, additional to (*p*), or substitutional for (*q*), specific

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(*g*) *Heseltine* v. *Simmons*, (1892) 2 Q. B. 547, C. A. See *Davies* v. *Jenkins*, (1900) 1 Q. B. 133, and sect. 8 of the Act of 1882, *ante*, p. 236.

(*h*) *Smith* v. *Whiteman*, (1909) 2 K. B. 437; *Hall* v. *Whiteman*, (1912) 1 K. B. 683.

(*i*) See *Davis* v. *Usher*, 12 Q. B. D. 490; *Darlow* v. *Bland*, (1897) 1 Q. B. 125.

(*k*) *Exp. Stanford*, *Re Barber*, *sup.*

(*l*) Sect. 10, sub-sect. 2, of Act of 1878, *post*, p. 257.

(*m*) *Carpenter* v. *Deen*, 23 Q. B. D. 566, C. A.; *Davies* v. *Jenkins*, (1900) 1 Q. B. 133.

(*n*) *Davidson* v. *Carlton Bank*, (1893) 1 Q. B. 82, C. A.

(*o*) *Exp. Hall*, *Re Lane*, 17 Q. B. D. 74.

(*p*) *Thomas* v. *Kelly*, 13 App. Ca. 506, overruling on this point *Roberts* v. *Roberts*, 13 Q. B. D. 794, C. A.

(*q*) *Hadden* v. *Oppenheim*, 60 L. T.

chattels assigned, will vitiate the bill. But a covenant to replace worn out articles with others of equal value for the maintenance of the security does not avoid the bill (*r*).

The question as to including in the assignment other property not being "personal chattels" has been already noticed (*s*).

The insertion of the words "by way of security" amongst the operative words of assignment is apparently not essential (*t*).

Statement of sum secured.

The principal amount secured must be stated as a definite sum to be payable at a definite time, and consequently a bill of sale cannot be made to cover further advances of an uncertain amount, or to secure an account current with a bank (*u*). So a bill of sale cannot be given by way of indemnity against liability on a guarantee under which no sum may ever become payable, or if the amount payable and the time at which the liability will commence and require to be satisfied are uncertain (*x*).

Interest.

The rate of interest may be such as agreed upon between the parties, however high, and even unreasonable (*y*); but it must be rateable, and calculated up to the time when the principal is to be called in (*z*). And, consequently, an attempt to make a bill of sale secure capitalized interest will vitiate the bill (*a*).

The rate of interest chargeable on the loan must be specified (*b*). But the statutable form does not restrict the rate of interest to a rate per cent. or per annum, and the rate may be specified as "one shilling in the pound per month," or otherwise as agreed (*c*). The statement of a lump sum as payable for interest is not sufficient compliance with the form (*d*).

Bonus.

It would seem doubtful whether a provision for the payment of a bonus can be included in the security of a bill of sale; at

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462. See *Levy* v. *Polack*, W. N. (1885) 76.

(*r*) *Coates* v. *Moore*, (1903) 2 K. B. 140, *post*, p. 248.

(*s*) *Ante*, p. 241.

(*t*) *Roberts* v. *Roberts*, 13 Q. B. D. 794, C. A.

(*u*) *Cook* v. *Taylor*, 3 T. L. R. 800.

(*x*) *Hughes* v. *Little*, 18 Q. B. D. 32, C. A.; *Re Hill, Exp. Off. Rec.*, 2 Mans. 208.

(*y*) *Exp. Stanford, Re Barber*, 17 Q. B. D. 259, C. A. See at p. 263, per Lord Esher, M. R.

(*z*) *Davis* v. *Burton*, 11 Q. B. D. 537, C. A. See *Haslewood* v. *Consolidated Credit Co.*, 25 Q. B. D. 555, C. A.

(*a*) *Davis* v. *Burton*, *sup.*

(*b*) *Blankenstein* v. *Robertson*, 24 Q. B. D. 543. But see *Wilson* v. *Kirkwood*, W. N. (1883) 40; 48 L. T. 821.

(*c*) *Lumley* v. *Simmons*, 34 Ch. D. 698, C. A.

(*d*) *Blankenstein* v. *Robertson*, 24 Q. B. D. 543. See *Myers* v. *Elliott*, 16 Q. B. D. 526, C. A.; *Exp. Abraham, Re Johnstone*, 50 L. T. 184; *Macey* v. *Gilbert*, 57 L. J. Q. B. 461.

all events a bill will be void, unless the amount sought to be made payable by way of bonus is distinctly specified as such (*e*).

Instalments.

The principal and interest are to be repayable by instalments. Indeed, it has been said that the interest is an essential part of the instalments made payable according to the form, and that the instalments must comprehend not only the principal sum but the interest (*f*), each instalment going in the first place to pay the interest due and the balance going towards repayment of principal; but it is not necessary to state how much of each instalment is to be appropriated to principal and how much to interest (*g*).

The equality of instalments is merely directory, not obligatory, and a bill of sale may be valid although the sum lent, together with interest, is made payable at specified times by unequal instalments (*h*).

So, also, it is sufficient if a bill of sale provides for payment of principal and interest by equal instalments "until the whole shall be paid," the first payment to be made on a specified date, as the number of instalments and the time for payment of the last instalment can be ascertained by calculation (*i*). And a bill of sale will not be avoided because the principal and interest cannot be exactly paid by instalments of the amounts specified (*k*).

But a bill of sale agreeing for payments which only keep down the interest and do not reduce the principal has been held to be void (*l*); and so has one where the amount of interest and the period when it was to be paid were both uncertain (*m*).

Covenant for payment of principal and interest.

Certainty in the time of payment is essential. So a bill of sale will be invalid if it contains a covenant to pay the sum advanced and interest on demand (*n*), or within a specified time after demand (*o*), even though it be provided that such demand

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(*e*) *Davis* v. *Burton*, 11 Q. B. D. 537, C. A.; *Myers* v. *Elliott*, *sup.*; *Re Williams, Exp. Pearce*, 25 Ch. D. 656; *Simmons* v. *Woodward*, (1892) A. C. 100.

(*f*) Per Lord Halsbury in *Simmons* v. *Woodward*, (1892) A. C. 100, at p. 107.

(*g*) *Rosefield* v. *Provincial Union Bank*, (1910) 2 K. B. 781.

(*h*) *Goldstrom* v. *Tallerman*, 18 Q. B. D. 1, C. A.; *Re Cleaver, Exp. Rawlings*, 18 Q. B. D. 489. See *Simmons* v. *Woodward*, *sup.*

(*i*) *Re Bargen, Exp. Hasluck*, (1894) 1 Q. B. 444. See *Edwards* v. *Marston*, (1891) 1 Q. B. 225, C. A.

(*k*) *Linfoot* v. *Pockett*, (1895) 2 Ch. 835, C. A. See *Rosefield* v. *Provincial Union Bank*, *sup.*

(*l*) *Cohen* v. *Milner*, 106 L. T. Jo. 14.

(*m*) *Attia* v. *Finch*, 91 L. T. 70.

(*n*) *Hetherington* v. *Groome*, 13 Q. B. D. 789, C. A.; *Sibley* v. *Higgs*, 15 Q. B. D. 619; *Mackay* v. *Merritt*, 34 W. R. 433.

(*o*) *Bishop* v. *Beale*, 1 T. L. R. 140; *Clewson* v. *Townsend*, 1 C. & E. 418.

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shall not be made before a specified time (*p*). The absence of a covenant for payment vitiates a bill of sale (*q*).

A bill of sale containing an agreement by the grantor to pay principal and interest "on or before" a fixed day is valid, as this merely amounts to an agreement to pay on a fixed date with a provision for defeasance (*r*).

It has been held that the time for payment may be fixed by reference to the happening of a specified event (*s*).

But the time must not be stated with reference to an event which may never happen (*t*).

There is no objection to a stipulation that, in case of default of payment of an instalment of principal and interest, the whole of the debt shall forthwith become payable (*u*).

It is not necessary that the principal and interest should be made payable together. The payment of principal may be postponed until the interest has been paid (*x*), and *vice versâ* (*y*).

Where a bill of sale contained a covenant to pay the amount by equal yearly instalments, and also a covenant to pay interest on "the said sum" at a specified rate quarterly, it was held, that the covenant as to payment of interest referred to the amount of principal owing for the time being after some of the instalments had been paid, and, consequently, that the bill of sale was in accordance with the statutory form (*z*).

The principal, with rateable interest, may be made payable in a single sum on a fixed date instead of by instalments, with (*a*) or without (*b*) a proviso that, if the grantor should not break any of the covenants nor become bankrupt, and should pay the principal and interest by equal monthly instalments on specified days, the grantee should accept payment by such instalments.

So, the principal may be made payable by specified instal-

(*p*) *Sibley* v. *Higgs*, 15 Q. B. D. 619.

(*q*) *Re Moore, Exp. Off. Rec.*, 4 Mans. 51.

(*r*) *De Braam* v. *Ford*, (1900) 1 Ch. 142, C. A.

(*s*) *Grannell* v. *Monck*, 24 L. R. Ir. 241; *Bianchi* v. *Offord*, 17 Q. B. D. 484, at p. 487, per Bowen, L. J.

(*t*) *Hughes* v. *Little*, 18 Q. B. D. 32, C. A.

(*u*) *Exp. Cochrane, Re Sendall*, 26 W. R. 818; *Lumley* v. *Simmons*, 34 Ch. D. 698, C. A.

(*x*) *Edwards* v. *Marston*, (1891) 1 Q. B. D. 225, C. A.

(*y*) *Goldstrom* v. *Tallerman*, 18 Q. B. D. 1, C. A.; *Re Cleaver, Exp. Rawlings*, 18 Q. B. D. 489, C. A.

(*z*) *Weardale Coal and Iron Co.* v. *Hodson*, (1894) 1 Q. B. 598, C. A.

(*a*) *Watkins* v. *Evans*, 18 Q. B. D. 386, C. A.

(*b*) *Exp. Payne, Re Coton*, 56 L. T. 571; 35 W. R. 476. See *Re Cleaver, Exp. Rawlings*, 18 Q. B. D. 489, C. A.

ments together with rateable interest on the instalments for the time being remaining unpaid (*c*).

Redemption.

Where the date of repayment is specified the grantee cannot ordinarily be redeemed before that time. And where principal and interest are repayable by instalments and the agreed date of repayment can be gathered by calculation, the grantor can only redeem on payment of interest up to the agreed date (*d*). But where a sale has by agreement taken place before the time for repayment, interest can only be claimed up to date of sale (*e*). The practice of Courts of Equity as to repayment to an unwilling mortgagee does not apply to a grantee of a bill of sale, and where goods subject to a bill of sale have been seized by the sheriff at the instance of an execution creditor, the Court may order a sale and payment to the grantee of principal and interest up to the date of payment (*f*); but this will not be done where it is doubtful whether the security is sufficient, unless the execution creditor guarantees the grantee against loss (*g*). If the grantee seizes for the purpose of realizing his security he cannot refuse a tender of principal and interest to date of seizure with costs, and the bill may be ordered to be given up on those terms (*h*).

Maintenance and defeasance of the security.

The statutory form permits the insertion of terms "as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security." Such terms must be such as are necessary for the purposes referred to, in order to be enforceable by seizure of the goods under sect. 7 of the Act of 1882. Agreement between the parties will not make a stipulation "necessary" if it is not so (*i*).

Insurance.

Covenants for payment of insurance premiums and production to the grantee of receipts for the same, are covenants "necessary for the maintenance of the security" and valid (*k*). And it may be stipulated that, on the grantor's default, the grantee may insure, and that premiums paid by him with interest shall be

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(*c*) *Haslewood* v. *Consolidated Credit Co.*, 25 Q. B. D. 555, C. A.

(*d*) *Re Davies, Exp. Equitable Investment Co.*, 77 L. T. 567; 4 Mans. 358.

(*e*) *West* v. *Diprose*, (1900) 1 Ch. 337.

(*f*) *Forster* v. *Clowser*, (1897) 2 Q. B. 362, C. A.

(*g*) *Stern* v. *Tegner*, (1898) 1 Q. B. 37, C. A.

(*h*) *Exp. Wickens*, (1898) 1 Q. B. 543, C. A.; cf. *Exp. Ellis*, (1898) 2 Q. B. 79, C. A.

(*i*) *Furber* v. *Cobb*, 18 Q. B. D. 494, C. A.

(*k*) *Duff* v. *Valentine*, W. N. (1883) 225; *Hammond* v. *Hocking*, 12 Q. B. D. 291; *Watkins* v. *Evans*, 18 Q. B. D. 386, C. A.

repayable on demand, and until repaid shall be a charge on the property (*l*).

Where a bill of sale, given to secure money advanced by several creditors of a trader, contained stipulations that he should not during the continuance of the security obtain credit above a specified amount from any persons, except those creditors, without their consent, and that he would give them the greater part of his business, and keep proper books of account, and permit the grantees or their agent to inspect them: it was held, that the insertion of these stipulations avoided the bill of sale as not in accordance with the statutable form (*m*).

Rent, taxes, &c.

A covenant to pay rent, rates, taxes, &c., and to produce receipts, is good (*n*). And it may be stipulated that, on the grantor's default, the grantee may make such payments to be repayable to him with interest on demand, and to be a charge on the property until repaid (*o*).

Repairs, &c.

Bills of sale have been upheld containing agreements to replace, or keep in repair, chattels which should become worn out, destroyed, injured, or deteriorated (*p*); and that, on the grantor's default so to do, the grantee might replace or repair the chattels, and that moneys expended by him for such purposes should be repayable to him on demand with interest, and be a charge on the property till repaid (*q*).

Such stipulations as above referred to for securing to the grantee the repayment of moneys expended by him, though they may be inserted by agreement between the parties, are not "necessary for the maintenance of the security" within the meaning of sect. 7 of the Act of 1882; they are accordingly enforceable by action on the covenant, and will have their effect when a foreclosure or redemption comes to be worked out; but any attempt to extend to a breach of such stipulations the power of seizure given by that section will be fatal to a bill of sale (*r*).

An unqualified covenant not to remove the chattels from the

(*l*) *Exp. Stanford, Re Barber*, 17 Q. B. D. 259, C. A.; *Briggs* v. *Pike*, 61 L. J. Q. B. 418.

(*m*) *Peace* v. *Brookes*, (1895) 2 Q. B. 451.

(*n*) *Turner* v. *Culpan*, 58 L. T. 340.

(*o*) *Goldstrom* v. *Tallerman*, 18 Q. B. D. 1, C. A.

(*p*) *Consolidated Credit Corporation* v. *Gosney*, 16 Q. B. D. 24; *Furber* v. *Cobb*, 18 Q. B. D. 494, C. A.; *Seed* v. *Bradley*, (1894) 1 Q. B. 319, C. A.; *Coates* v. *Moore*, (1903) 2 K. B. 140, C. A.

(*q*) *Topley* v. *Corsbie*, 20 Q. B. D. 350.

(*r*) *Bianchi* v. *Offord*, 17 Q. B. D. 484, Bowen, L. J.; *Real and Personal Advance Co.* v. *Clears*, 20 Q. B. D. 304, C. A.

premises without the consent of the grantee is good (*s*). And it would seem that such a covenant, as well as a covenant to produce receipts for rent, taxes, &c., will be deemed covenants necessary for the maintenance of the security, so that a breach of such covenants will render the chattels assigned liable to seizure under sect. 7 of the Act of 1882 (*t*).

Covenants for title.

It has been seen that the grantor must not be made to convey "as beneficial owner," thereby attempting to import into a bill of sale the full statutory covenants for title, including the covenant for immediate possession by the grantee on default, and quiet enjoyment thereafter (*u*). But it has been held that an express covenant for further assurance at the cost of the grantor, in the usual form, binding the grantor and all persons claiming through or under him, was a covenant "for the maintenance of the security," and consequently free from objection (*x*).

Powers of seizure and sale.

The events, upon the happening of which the chattels assigned by a bill of sale are liable to be seized or taken possession of by the grantee, have been already considered (*y*).

Upon the happening of any of these events, and after reasonable notice to the grantor, the grantee of a valid bill of sale may, though the bill contains no express power of seizure or sale, seize and take possession of the chattels, and after the expiration of five clear days thereafter remove and sell them, subject to the grantor's right to redeem them at any time before actual sale (*z*).

It seems to be settled, after some difference of judicial opinion (*z*), that the statutory powers of the Conveyancing Act, 1881, ss. 19—21, as to powers of sale, are not incorporated into the statutable form of a bill of sale given by the Bills of Sale Act, 1882, but that an implied power of seizure and sale arises under the Bills of Sale Act, 1882, itself (*a*).

There is no objection to the insertion in a bill of sale of an express power to seize and sell the assigned chattels, provided

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(*s*) See *ante*, p. 234.

(*t*) *Furber* v. *Cobb*, 18 Q. B. D. 494, C. A., at pp. 505, 506.

(*u*) See *ante*, p. 243.

(*x*) *Re Cleaver, Exp. Rawlings*, 18 Q. B. D. 489, C. A.

(*y*) Sect. 7 of the Act of 1882, *ante*, p. 230.

(*z*) *Exp. Official Receiver, Re Morritt*, 18 Q. B. D. 222, C. A.; *Watkins* v. *Evans*, 18 Q. B. D. 386, C. A.

(*a*) *Calvert* v. *Thomas*, 19 Q. B. D. 204, C. A.

that the terms of the power are not calculated to mislead the grantor or to alter the legal rights of the parties (*b*).

An express power may be given to the grantee to "sell the goods by private treaty or public auction on or off the premises" (*c*).

A power to sell on default in payment "on demand" (*d*), or within a specified time after demand (*e*), is bad.

The following provisions contained in express powers of seizure and sale have been held to vitiate bills of sale :—

That the power should be exerciseable "if the mortgagor should take the benefit of any Bankruptcy Act," as conferring a power to seize in the event of a mortgagor effecting a composition under the Bankruptcy Act, 1883 (*f*).

That the grantee might have the goods valued, and purchase them at such valuation (*g*).

That the purchaser should not be bound to see or inquire whether any default had occurred in payment of the sums secured (*h*).

That after payment of the sums secured, the bill of sale and other documents relating to the loan should remain in the custody and be the property of the grantee (*i*).

That the grantee may retain out of the proceeds of sale his commission as auctioneer, as though he were selling on behalf of the grantor (*k*); or "the expenses attending such sale, or otherwise incurred in relation to the security" (*l*); or all expenses to which the grantor "might be put" (*m*). But the power may provide that the grantee may retain the costs of entry, of discharging distresses, executions, or incumbrances, of seizure, keeping possession, removal, warehousing, and sale (*n*).

Power to seize forcibly will not avoid a bill of sale (*o*).

Proviso limiting right of seizure.

The omission from a bill of sale of any reference to the proviso given in the statutable form that the goods shall not be

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(*b*) *Exp. Official Receiver*, *Re Morritt*, 18 Q. B. D. 222, C. A.; *Briggs* v. *Pike*, 61 L. J. Q. B. 418; 66 L. T. 637.

(*c*) *Bourne* v. *Wall*, 64 L. T. 530.

(*d*) *Hetherington* v. *Groome*, 13 Q. B. D. 789, C. A.

(*e*) *Sibley* v. *Higgs*, 15 Q. B. D. 619.

(*f*) *Gilroy* v. *Bowey*, 59 L. T. 223.

(*g*) *Lyon* v. *Morris*, 19 Q. B. D. 139, C. A.

(*h*) *Blaiberg* v. *Beckett*, 18 Q. B. D. 96, C. A., following *Blaiberg* v. *Parsons*, 17 Q. B. D. 336.

(*i*) *Watson* v. *Strickland*, 19 Q. B. D. 391, C. A.

(*k*) *Furber* v. *Cobb*, 18 Q. B. D. 494, C. A.

(*l*) *Calvert* v. *Thomas*, 19 Q. B. D. 204, C. A.

(*m*) *Macey* v. *Gilbert*, 57 L. J. Q. B. 461.

(*n*) *Exp. Official Receiver*, *Re Morritt*, 18 Q. B. D. 222, C. A.; *Lumley* v. *Simmons*, 34 Ch. D. 698, C. A.

(*o*) *Ibid.*

liable to seizure for any cause other than those specified in sect. 7 of the Act of 1882, would apparently vitiate the bill (*p*).

But the statutable proviso need not be inserted in so many words, if the effect of the words used is substantially the same (*q*).

The insertion of the proviso will not render a bill of sale valid, if the bill contains other provisions which are inconsistent with the provisions of the Bills of Sale Acts (*r*).

Attestation clause.

A bill of sale will be void as not in accordance with the statutable form, if it does not state not only the name and address, but also the correct description of the occupation or style of the attesting witness (*s*).

xiii.—Defeasances, Conditions, and Declarations of Trust. —Sect. 10, sub-s. (3), of the Act of 1878, enacts as follows :—

Defeasance, condition or declaration of trust to be deemed part of bill of sale.

> "If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration, shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

Meaning of "defeasance."

A defeasance is a collateral deed made at the same time as the grant, containing certain conditions, upon the performance of which the estate created by such grant may be defeated. It differs from a condition in this respect, that a condition is inserted in the deed by which the estate is created. A defeasance is a separate deed executed at the same time (*t*).

Where a bill of sale and a mortgage of certain reversionary interests were given on the same day to secure the same debt, and by the bill of sale simple interest was made payable by instalments, but by the mortgage compound interest was made payable by instalments on the same day as those mentioned in the bill of sale, it was held, that the condition in the mortgage

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(*p*) *Thomas* v. *Kelly*, 13 App. Ca. 506, at p. 519, per Lord Macnaghten.

(*q*) *Exp. Allam*, *Re Munday*, 14 Q. B. D. 43; *Cartwright* v. *Regan*, (1895) 1 Q. B. 900.

(*r*) *Re Williams*, *Exp. Pearce*, 25 Ch. D. 656. See *Barr* v. *Kingsford*, 56 L. T. 861.

(*s*) *Sims* v. *Trollope*, (1897) 1 Q. B. 24, C. A. As to description, see *post*, p. 262.

(*t*) Cruise, Digest, tit. xxxii. c. vii. s. 25.

operated as a condition of the bill of sale within sub-s. (3) of sect. 10, and that the registration of the bill was consequently void (*u*).

So an arrangement altering the mode and terms of payment, even though it does not alter the amount payable, is a defeasance within the section, and if not contained in the bill of sale nor written on the same paper, the bill of sale is void (*x*).

So the giving of a bill of exchange, promissory note, or other instrument by way of collateral security for a debt secured by a bill of sale, will operate as a defeasance and vitiate the registration if such collateral instrument is in any respect inconsistent with the provisions of the Bills of Sale Acts, or with the terms of the particular bill, or in any way tends to alter the rights of the parties (*y*).

But a promissory note so given is not itself avoided (*z*).

Conditions.

Similarly, all the covenants and conditions of the contract must be set out in the bill of sale itself or on the same paper as the bill, and not incorporated by reference to another instrument specifically (*a*), or to other instruments generally (*b*). Nor will the omission of such reference save from avoidance a bill, though framed in strict accordance with the statutable form, if the evidence shows that the bill is dependent for its real effect on some other instrument (*c*).

A collateral agreement as to the application of the consideration money is not necessarily a defeasance, condition, or declaration of trust within the meaning of this enactment (*d*).

An antecedent parol agreement for payment of the debt by instalments must be inserted in the bill of sale (*e*); but a memorandum explaining a charge in the bill of sale for bonus and interest, is not within the Acts (*f*).

Nor a collateral agreement that the grantee shall, in the first

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(*u*) *Edwards* v. *Marcus*, (1894) 1 Q. B. 587. See *Ellis* v. *Wright*, 76 L. T. 522.

(*x*) *Pettit* v. *Lodge*, (1908) 1 K. B. 744, explained in *Smith* v. *Whiteman*, (1909) 2 K. B. 437, C. A.

(*y*) *Simpson* v. *Charing Cross Bank*, 34 W. R. 568; *Counsell* v. *London and Westminster Loan and Discount Co.*, 19 Q. B. D. 512, C. A.; *Orm* v. *Fisher*, 5 T. L. R. 504; *Re Jones*, 55 S. J. 30.

(*z*) *Monetary Advance Co.* v. *Cater*, 20 Q. B. D. 785.

(*a*) *Lee* v. *Barnes*, 17 Q. B. D. 77.

(*b*) *Watson* v. *Strickland*, 19 Q. B. D. 391, C. A.

(*c*) *Sharp* v. *M'Henry*, 38 Ch. D. 427; *Edwards* v. *Marcus*, (1894) 1 Q. B. 587; *Smith* v. *Whiteman*, (1909) 2 K. B. 437, C. A.

(*d*) *Thomas* v. *Searles*, (1891) 2 Q. B. 408, C. A. See *Re Davies, Exp. Equitable Investment Co.*, 77 L. T. 567; *Re Wiltshire, Exp. Eynon*, (1900) 1 Q. B. 96.

(*e*) *Exp. Southam*, L. R. 17 Eq. 578.

(*f*) *Exp. Collins, Re Lees*, L. R. 10 Ch. 367.

place, resort for payment to securities other than the bill of sale (*g*).

Nor an agreement not to register in consideration of a bonus (*h*). The agreement in the case referred to was by parol; and it would seem that a parol agreement cannot be a defeasance (*i*).

Nor the deposit with the grantee of a policy of assurance on the life of the grantor by way of collateral security (*k*).

Declaration of trust.

The declaration of trust referred to in sect. 2 of the Act of 1854, and sect. 10 of the Act of 1878, does not apply to a trust declared in favour of a third party; the defeasance, condition or trust must be one in favour of either the grantor or the grantee (*l*) or an undisclosed grantee (*m*).

Execution by attorney.

xiv.—Execution and Attestation of Bills of Sale.—A bill of sale may be executed under a power of attorney, and the grantee is not necessarily excluded from being the grantor's attorney for that purpose (*n*).

Bill of sale must be duly attested.

By sect. 8 of the Act of 1878 (*o*), it was provided that every bill of sale should be duly attested, otherwise such bill of sale, as against all trustees in bankruptcy, &c., should be deemed fraudulent and void.

By sect. 8 of the Act of 1882, it is provided that every bill of sale coming within that Act shall be duly attested; "otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

Meaning of "duly attested."

"Duly attested" means attested in accordance with the provisions of the Act and with the statutable form of a bill of sale (*p*).

The form in the schedule to the Act of 1882 requires the address and description of the witness attesting the execution of a bill of sale by the grantor to be given, although the witness is without business or occupation (*q*). But where

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(*g*) *Heseltine* v. *Simmons*, (1892) 2 Q. B. 547, C. A.

(*h*) *Exp. Popplewell, Re Storey*, 21 Ch. D. 73, C. A.

(*i*) Per Jessel, M. R., 21 Ch. D. at p. 81.

(*k*) *Carpenter* v. *Deen*, 23 Q. B. D. 566, C. A.

(*l*) *Robinson* v. *Collingwood*, 17 C. B. N. S. 777; 34 L. J. C. P. 18.

(*m*) *Kinnersley* v. *Payne*, 100 L. T. 229.

(*n*) *Furnivall* v. *Hudson*, (1893) 1 Ch. 335.

(*o*) This section is repealed, as to bills of sale by way of security made after the commencement of the Act of 1882; see *ante*, p. 236.

(*p*) *Parsons* v. *Brand*, 25 Q. B. D. 110, C. A.

(*q*) *Sims* v. *Trollope*, (1897) 1 Q. B. 24.

a bill of sale had two separate clauses attesting the execution of the instrument by different grantors, and the same name appeared in both cases as that of the attesting witness thereto respectively, in one case giving, and in the other omitting to give, the address and description of the attesting witness, it was held that the Court might infer from a comparison of the handwriting that the same person attested both clauses, and further, that the omission to repeat the address and description was not such a departure from the statutable form as to avoid the bill of sale (*r*).

Attestation by solicitor.

By sect. 10 (1) of the Act of 1878, it was provided that the execution of every bill of sale should be attested by a solicitor of the Supreme Court, and the attestation should state that before the execution of the bill of sale the effect thereof had been explained to the grantor by the attesting solicitor. But a bill of sale under the Act, although not so explained and attested, is not void as between the grantor and grantee (*s*). Attestation by the solicitor of the grantee is sufficient (*t*). The affidavit must prove the attestation by the solicitor (*u*).

The attesting solicitor may be a managing clerk not practising on his own account (*x*), and it would seem that he need not hold a certificate entitling him to practise (*y*).

It has been held that the grantee of a bill of sale, although a solicitor, cannot be the attesting witness under sect. 10 of the Act of 1878 (*z*); and this rule has been incorporated in sect. 10 of the Act of 1882.

Credible witness.

By the section last referred to, the above enactment as to attestation by a solicitor, and explanation to the grantee, has been repealed; and attestation by any credible witness, not being a party to the bill of sale, will suffice, so far as regards bills of sale given by way of security on or after the 1st November, 1882 (*a*).

(*r*) *Bird* v. *Davey*, (1891) 1 Q. B. 29, C. A.

(*s*) *Davis* v. *Goodman*, 5 C. P. D. 128, C. A.; *Exp. National Mercantile Bank*, *Re Haynes*, 15 Ch. D. 42; *Hill* v. *Kirkwood*, 28 W. R. 358, C. A.

(*t*) *Penwarden* v. *Roberts*, 9 Q. B. D. 137. See *Vernon* v. *Cooke*, 49 L. J. C. P. 767.

(*u*) *Sharpe* v. *Birch*, 8 Q. B. D. 111.

(*x*) *Hill* v. *Kirkwood*, 28 W. R. 358, C. A.

(*y*) *Holgate* v. *Slight*, 21 L. J. Q. B. 74.

(*z*) *Seal* v. *Claridge*, 7 Q. B. D. 516, C. A.

(*a*) See sect. 3 of that Act, *ante*, p. 198. See also *Casson* v. *Churchley*, 53 L. J. Q. B. 335.

If a person is in the position of a party, though not an actual party, to a bill of sale, he cannot attest it (*b*).

As the Act of 1882 is confined to bills of sale given by way of security, it would seem that bills of sale given otherwise than by way of security should still be attested with the formalities prescribed by the principal Act (*c*).

Position of signature, &c.

A bill of sale was held to be duly executed where the signature and seal of the grantor were placed at the end of a schedule annexed to the bill (*d*).

Every bill of sale must be registered.

xv.—Registration of Bills of Sale—The Affidavit.—By sect. 8 of the Act of 1878, it was provided that every bill of sale should be registered under that Act within seven days after the making or giving thereof, otherwise such bill of sale, as against all trustees or assignees, &c., should be deemed fraudulent and void. This section is repealed by sect. 15 of the Act of 1882, but not so as to affect the validity of anything done or suffered under the former before the commencement of the later Act (*e*).

By sect. 8 of the Act of 1882, it is enacted as follows :—

> "Every bill of sale shall be registered under the principal Act within seven clear days after the execution thereof (or if it is executed in any place out of England, then within seven clear days after the time in which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof); . . . . . otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

The "seven clear days" within which the bill is required to be registered are to be reckoned exclusively of the day of execution. If the seventh day falls on a Sunday, or on a holiday, when the registrar's office is not open, the registration will be valid if effected on the next following day on which the offices are open (*f*).

An imperfect registration does not place the assignee in a worse position than if there were none (*g*).

The registration on the day of the execution is complete,

(*b*) *Kinnersley* v. *Payne*, 100 L. T. 229.

(*c*) *Casson* v. *Churchley*, *sup.*

(*d*) *Melville* v. *Stringer*, 12 Q. B. D. 132.

(*e*) See, as to the extent of the repeal, *ante*, p. 236.

(*f*) Act of 1878, s. 22.

(*g*) *Banbury* v. *White*, 2 H. & C. 300.

though the consideration was not paid nor the deed attested till after the day of the actual execution (*h*).

Successive bills of sale.

Under the Act of 1854, there were conflicting decisions in regard to successive bills of sale, made to avoid registration. The result would seem to be that such transactions, not being forbidden by the Legislature, were to be deemed valid as against an execution creditor (*i*); but in bankruptcy the successive unregistered bills of sale were not regarded with favour, and the last bill, being for a past debt, was generally treated as void (*k*).

Avoidance of certain successive bills of sale.

A remedy is effected by sect. 9 of the Act of 1878, by which it is enacted as follows :—

> "Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognizance of the case that the subsequent bill of sale was *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading the Act."

Correction of mistake.

If a mistake was made in the first registry, the bill of sale could under the former practice be re-registered (*l*).

A registered bill of sale, *bonâ fide* founded on a parol agreement for a bill of sale, is not a subsequent bill of sale within this section (*m*). The giving of a bill of sale for the purpose of confirming an earlier one supposed to be defective does not cancel the first bill if valid (*n*).

Power to make rules.

By sect. 21 of the Act of 1878, power is given to make and alter rules for the purposes of the Bills of Sale Acts, and rules have been made accordingly (*o*).

By sect. 10, sub-s. (2), of the Act of 1878, after making pro-

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(*h*) *Darvill* v. *Terry*, 6 H. & N. 807.

(*i*) *Hollingworth* v. *White*, 10 W. R. 619, Q. B.; *Smale* v. *Burr*, L. R. 8 C. P. 64; *Ramsden* v. *Lupton*, L. R. 9 Q. B. 17, Ex. Ch. See *Exp. Harris*, L. R. 8 Ch. 48.

(*k*) *Stansfield* v. *Cubitt*, 2 De G. & J. 222, 228; *Exp. Cohen. Re Sparke*, L. R. 7 Ch. 20; *Exp. Stevens*, L. R. 20 Eq. 786. But see *Re Jackson*, 4 Ch. D. 682; *Exp. Furber*, 6 Ch D. 181. And see *Exp. Payne*, 11 Ch. D. 539, C. A.

(*l*) *Re O'Brien*, 10 Ir. Com. Law App. xxxiii.

(*m*) *Exp. Hauxwell*, 23 Ch. D. 626, 637, C. A.

(*n*) *Cooper* v. *Zeffert*, 32 W. R. 402, C. A.

(*o*) See R. S. C. LXI.

vision as to the execution and attestation of a bill of sale, it is enacted as follows :—

Mode of registering and attesting bills of sale.

> "Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule and inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed."

Priorities of bills of sale.

By the same section it is provided that bills of sale shall rank in priority, *inter se*, according to the date of registration ; the question of such priority will be discussed in a later chapter (*p*).

The schedule.

Where the schedule to a bill of sale described goods by numbers as per catalogue, it was held that the catalogue being referred to not in the bill itself, but only in the schedule, which was treated as distinct from the bill, did not require registration (*q*).

What is a true copy.

A true copy is not invalidated for clerical errors, such as the mis-spelling of a name (*r*), or obvious mis-statement as to the date (*s*), or as to the amount of consideration (*t*), or as to the place of residence of a party (*u*), or the omission of the date or a few words which occur in the original document (*x*), or if blanks are left which do not occur in the original (*y*), provided such errors or omissions are not calculated to mislead, and the affidavit filed with the copy may be looked at to supply the omission (*z*).

(*p*) *Post*, Chap. LVI. Sect. iii.

(*q*) *Davidson* v. *Carlton Bank*, (1893) 1 Q. B. 82, C. A.

(*r*) *Gardnor* v. *Shaw*, 19 W. R. 753 ; *Corbett* v. *Rowe*, 25 W. R. 59.

(*s*) *Lamb* v. *Bruce*, 45 L. J. Q. B. 538. See *Hollingsworth* v. *White*, 10 W. R. 619.

(*t*) *Elliott* v. *Freeman*, 7 L. T. N. S. 715.

(*u*) *Exp. McHattie, Re Wood*, 10 Ch. D. 398, C. A.

(*x*) *Exp. Kahen, Re Hewer*, 21 Ch. D. 871, C. A. ; *Coates* v. *Moore*, (1903) 2 K. B. 140.

(*y*) *Sharp* v. *McHenry* (No. 2), 38 Ch. D 427 ; *Thomas* v. *Roberts*, *inf.*

(*z*) *Thomas* v. *Roberts*, (1898) 1 Q. B. 657.

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Copy of bill of sale to be filed.

Sect. 10 does not require that the bills of sale and the schedule or inventory should themselves be filed, but only a copy thereof, together with the affidavit, though the originals of all the documents must be presented to the registrar.

Under the Act of 1854, which allowed either originals or copies to be filed, it was held that the registration of a copy of a schedule, together with the original bill, was permissible where the original schedule had been disannexed from the bill and lost (*a*).

Under the repealed Acts a certificate of the filing of the bill of sale was no proof that a valid affidavit had been filed (*b*); nor were the contents of a bill of sale proved by the certificate of the Court (*c*). Nor under the present Acts is production of a certificate of registration evidence of due registration (*d*).

By sect. 13 of the Act of 1878, it is enacted that—

The registrar.

"The masters of the Supreme Court of Judicature attached to the Queen's Bench Division of the High Court of Justice, or such other officers as may for the time being be assigned for this purpose under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, are to be the registrars for the purposes of this Act, and any one of the said masters may perform all or any of the duties of the registrar."

The duties of the registering officer are ministerial only, and it is not within his province to inquire whether the bill of sale and affidavit comply with the provisions of the Act (*e*).

Local registration of contents of bill of sale.

By sect. 11 of the Act of 1882, it is provided that in case of the residence of the grantor or the situation of the goods enumerated in the bill of sale being outside the London Bankruptcy district, the registrar under the Act of 1878 must transmit to the local registry, within three days, an abstract of the contents thereof to be filed, kept, and indexed therein, in which searches may be made (*f*).

By sect. 17 of the Act of 1878, it is enacted that—

Affidavits.

"Every affidavit required by or for the purposes of the Act may be sworn before a master of any Division of the High Court of

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(*a*) *Green* v. *Attenborough*, 3 H. & C. 468.

(*b*) *Mason* v. *Wood*, 1 C. P. D. 63.

(*c*) *Emmott* v. *Marchant*, 3 Q. B. D. 555.

(*d*) *Turner* v. *Culpan*, 36 W. R. 278.

(*e*) *Needham* v. *Johnson*, 15 W. R. 346.

(*f*) See R. S. C., Bills of Sale Acts, 1884. And see *Trinder* v. *Raynor*, 56 L. J. Q. B. 422.

Justice, or before any commissioner empowered to take affidavits in the Supreme Court of Judicature.

"Whoever wilfully makes or uses any false affidavit for the purposes of the Act shall be deemed guilty of wilful and corrupt perjury."

Affidavit of execution.

An affidavit of due execution must be sworn before an independent solicitor, and consequently the registration of a bill of sale will be void, if sworn before a commissioner of oaths who has acted in the matter as solicitor for the grantee (*g*).

A reference by the grantor to an affidavit, as sworn before a commissioner of a wrong Court, the commissioner being also a commissioner of the right Court, did not invalidate the affidavit (*h*).

Statement of date of execution.

The affidavit to be filed on registration must state the true date on which the bill of sale was executed; but a statement that the bill of sale was executed on the day on which it is dated is sufficient (*i*).

Statement of due execution and attestation.

The affidavit must also state that the bill was duly executed and attested.

Sufficiency of attestation.

The decisions as to the sufficiency of the affidavit of due attestation for the most part relate to attestation by a solicitor and explanation of the effect of the bill, which are no longer required in the case of bills of sale given by way of security (*k*). It would seem that in the case of any attesting witness, no less than in the case of a solicitor, it is not necessary to say in so many words that the witness attested, if the fact may be gathered upon reading the whole affidavit (*l*).

Description of grantor.

It is sufficient if the description of the grantor is in the introductory part of the affidavit (*m*).

A description in the bill of sale is not enough; there must be the description in the affidavit filed with it (*n*). If there is no description in the affidavit (*o*), or if the description therein is untruly stated (*p*), the defect cannot be supplied by reference to the bill of sale. But if the description in the affidavit is ambiguous, it is sufficient if the copy of the bill of sale annexed

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(*g*) *Baker* v. *Ambrose*, (1896) 2 Q. B. 372.

(*h*) *Cheney* v. *Courtois*, 32 L. J. C. P. 116.

(*i*) *Lamb* v. *Bruce*, 45 L. J. Q. B. 538.

(*k*) See *ante*, p. 254.

(*l*) *Yates* v. *Ashcroft*, 31 W. R. 156. See *Cooper* v. *Zeffert*, 32 W. R. 402.

(*m*) *Blaiberg* v. *Parke*, 10 Q. B. D. 90.

(*n*) *Hatton* v. *English*, 7 E. & B. 94.

(*o*) *Pickard* v. *Bretz*, 5 H. & N. 9.

(*p*) *Brodrick* v. *Scalé*, L. R. 6 C. P. 98.

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to the affidavit gives the requisite information with reasonable certainty, so as to identify the grantor (*q*).

An affidavit, which in effect verified the correctness of the descriptions and residences of the parties as contained in the bill of sale, was held to be sufficient (*r*).

Where the description of the residence and occupation was contained in the bill of sale, but the occupation was not described in the affidavit, the Act was not complied with (*s*), though the grantor was referred to in the affidavit as *the said* C. B. (*t*).

The sufficiency of the description is a question for the judge, and not for the jury (*u*).

Sufficiency of description.

The burden of proof is on the person seeking to impugn the description (*x*).

A description by a deponent to the best of his belief is sufficient (*y*). A description of the deponent in the affidavit itself is sufficient (*z*).

The description must be of the residence and occupation at the time of swearing the affidavit, and not of executing the bill of sale (*a*). But this did not apply when, after execution, the grantor left his residence for America (*b*).

Description where several grantors.

If there are two grantors, the affidavit must describe the residence and occupation of both. So, where a bill of sale was executed by two grantors, of whom one was in possession of the goods at the time of their seizure under a *fi. fa.*, an affidavit describing the residence and occupation of that grantor only was held to be insufficient (*c*).

But in a case where a bill of sale and the affidavit filed on its registration described the grantors (who were father and son) by their true addresses, and added that they were manufacturers carrying on business together under a specified firm; and it appeared that they had, in fact, formerly carried on the business

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(*q*) *Jones* v. *Harris*, L. R. 7 Q. B. 157; *Exp. Mackenzie, Re Bent*, 42 L. J. Bk. 25.

(*r*) *Foulger* v. *Taylor*, 5 H. & N. 202. See *Banbury* v. *White*, 9 Jur. N. S. 913.

(*s*) *Hatton* v. *English*, 7 E. & B. 94.

(*t*) *Pickard* v. *Bretz*, 5 H. & N. 9.

(*u*) *Phillips* v. *Burt*, 2 F. & F. 862.

(*x*) *Sutton* v. *Bath*, 3 H. & N. 382; *Grant* v. *Shaw*, L. R. 7 Q. B. 700.

(*y*) *Roe* v. *Bradshaw*, L. R. 1 Ex. 106.

(*z*) *Allen* v. *Thompson*, 1 H. & N. 15; *Sladden* v. *Sargeant*, 1 F. & F. 322; *Exp. Lowenthal*, L. R. 9 Ch. 329.

(*a*) *Button* v. *O'Neill*, 4 C. P. D. 354, disapproving of *London and Westminster Loan Co.* v. *Chace*, 12 C. B. N. S. 730.

(*b*) *Exp. Kahen, Re Hewer*, 21 Ch. D. 871.

(*c*) *Hooper* v. *Parmenter*, 10 W. R. 648.

of manufacturers in partnership, but, at the time when the bill of sale was executed, the partnership had been dissolved, and the business was being carried on by the father alone, the son being in his employment as a clerk; the property comprised in the deed in fact belonged to the father alone, though both father and son joined in the assignment; the father alone filed a liquidation petition: it was held that there was no misdescription of the grantors such as to affect the validity of the registration, first, because the son not being a bankrupt, any misdescription of him was immaterial; secondly, because as to the father, the statement that he was carrying on business with the son was mere surplusage, and was not misleading (*d*).

Name of grantor.

The Bills of Sale Act, 1854, did not require the name of the grantor to be stated; neither do the Acts of 1878 and 1882 (*e*); and accordingly, where in an affidavit, as well as in the bill itself, the christian name of the grantor was wilfully mis-stated, for the purpose of concealing the fact that he had given a bill of sale, it was held that, it not being alleged that the execution creditor was misled by the description, the registration was not thereby rendered invalid (*f*). In both the cases last cited it was the christian name, and not the surname, which was mis-stated. But in a later case a bill of sale given in an assumed name, by which alone the grantor was known in the locality where she resided, was held to be duly executed and registered (*g*). And where a grantor had become known by a surname other than his own, but was described by his true name, the registration was held valid in the absence of any intention to mislead creditors (*h*).

Both in the case of the grantor and of the attesting witness, the requirement as to residence is complied with by reference to the place of business or employment, though he sleep elsewhere (*i*). If he has two residences, it has been held in one case that they must both be stated (*k*); but it seems to be now settled that it is sufficient to state the principal place of residence or business (*l*).

(*d*) *Exp. Popplewell, Re Storey*, 21 Ch. D. 73, C. A.; cf. *Saunders* v. *White*, (1902) 1 K. B. 472, C. A.

(*e*) *Exp. McHattie, Re Wood*, 10 Ch. D. 398, C. A.

(*f*) *Downs* v. *Salmon*, 20 Q. B. D. 775.

(*g*) *Central Bank of London* v. *Hawkins*, 60 L. T. 901.

(*h*) *Stokes* v. *Spencer*, (1900) 2 Q. B. 483.

(*i*) *Blackwell* v. *England*, 8 E. & B. 541; *Attenborough* v. *Thompson*, 2 H. & N. 559.

(*k*) *Wallis* v. *Smith*, W. N. (1882) 77.

(*l*) *Exp. Knightley, Re Moulson*, 51 L. J. Ch. 823; *Cooper* v. *Ibberson*, 29

A witness, if a clerk or otherwise employed by another person, may describe himself as such, and give as his address his employer's place of business, provided that he is habitually to be found at that address, so that persons interested in the goods can be sure the inquiries addressed there will reach him (*m*).

Mistake in description.

An erroneous addition (*n*) or omission (*o*) in the statement of the residence, if not calculated to mislead, will not vitiate the affidavit.

A mistake in the number of the street has been held to be fatal (*p*).

A statement that the attesting witness was "residing at Acton, in the city of London," was held not to vitiate the affidavit, though Acton is in Middlesex (*q*).

Description of attesting witness.

The affidavit must contain the description of every attesting witness (*r*).

No statement of the occupation of a trading company is necessary, nor of its directors, who sign the bill of sale as such for the purpose of authenticating the seal, and accordingly are not considered to be attesting witnesses within the Act (*s*).

A peer is sufficiently described by his title (*t*).

Description of witness as "gentleman."

The description "gentleman," which means a person without an occupation (*u*), was held to be improperly applied to a clerk in a government office (*x*); to a solicitor (*y*); to an attorney's clerk (*z*); to a person who had been an attorney, but was acting as clerk to another attorney (*a*); to a traveller for a house of business (*a*); in fact, to anyone who has an employment (*b*); but it is sufficient if the witness has no employment, or no

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W. R. 566; *Greenham* v. *Child*, 24 Q. B. D. 29. See *Hewer* v. *Cox*, 3 E. & E. 428.

(*m*) *Simmons* v. *Woodward*, (1892) A. C. 100; *Hickley* v. *Greenwood*, 59 L. T. 137. See *Lamb* v. *Bruce*, 24 W. R. 645.

(*n*) *Hewer* v. *Cox*, 3 E. & E. 428; *Exp. McHattie*, 10 Ch. D. 390, C. A.

(*o*) *Throssell* v. *Marsh*, 53 L. T. 321.

(*p*) *Murray* v. *McKenzie*, L. R. 10 C. P. 625; *Marks* v. *Derrick*, 80 L. T. 60.

(*q*) *Blount* v. *Harris*, 4 Q. B. D. 603.

(*r*) *Pickard* v. *Marriage*, 1 Ex. D. 364; *Nicholson* v. *Cooper*, 3 H. & N. 384.

(*s*) *Shears* v. *Jacob*, L. R. 1 C. P. 513; *Deffell* v. *White*, L. R. 2 C. P. 144.

(*t*) *Re Earl of Limerick*, 7 Ir. Jur. N. S. 65.

(*u*) *Gray* v. *Jones*, 14 C. B. N. S. 743.

(*x*) *Allen* v. *Thompson*, 1 H. & N. 15; *Brodrick* v. *Scalé*, L. R. 6 C. P. 98.

(*y*) *Tuton* v. *Sanoner*, 3 H. & N. 280.

(*z*) *Dryden* v. *Hope*, 9 W. R. 18.

(*a*) *Matthews* v. *Buchanan*, 5 T. L. R. 373.

(*b*) *Beales* v. *Tennant*, 29 L. J. Q. B. 188; *Adams* v. *Graham*, 33 L. J. Q. B. 71.

regular employment (*c*), or if he is only a dormant partner in a firm (*d*).

Descriptions held to be insufficient.

The following descriptions were held not sufficient:—"accountant," by a clerk in an accountant's office (*e*); "esquire," when the grantor was manager of a theatre (*f*); "as of the city of Cork, law clerk," as not giving sufficient facility for finding the witness if required (*g*); "until lately a commercial traveller," when he was a commercial traveller (*h*); "tutor," when he was a schoolmaster (*i*).

Where the grantee of a bill of sale in the affidavit filed under sect. 10 described himself as carrying on business as a wine merchant, he being in fact only a paid manager, the misdescription was held fatal (*k*).

Descriptions held to be sufficient.

The following descriptions were held sufficient:—"now in no occupation," of a person formerly in the militia (*l*); "government clerk," being a clerk in the Admiralty (*m*); "widow," where the witness was widow and executrix of her husband, a farmer, winding up the business through a bailiff (*n*); "wife of" A. B., where the witness was a lessee of a public-house, in which her husband carried on business under a licence taken out in his name (*o*). "Married woman" is enough if it sufficiently describes her occupation (*p*), but not otherwise (*q*), for if a married woman has an occupation it must be described (*r*).

If the grantor or witness exercises more than one occupation, it would seem to be sufficient if the principal occupation is stated in the affidavit (*s*).

A future occupation which is merely in prospect, and has not actually commenced (*t*), or an occupation which has ceased (*u*),

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(*c*) *Morewood* v. *S. Yorkshire Rail., &c. Co.*, 3 H. & N. 798; *Sutton* v. *Bath*, 3 H. & N. 382; *Smith* v. *Cheese*, 1 C. P. D. 60.

(*d*) *Feast* v. *Robinson*, W. N. (1894) 14; 63 L. J. Ch. 321.

(*e*) *Larchin* v. *North-Western Deposit Bank*, L. R. 10 Ex. 64, not extending *Briggs* v. *Boss*, L. R. 3 Q. B. 268.

(*f*) *Exp. Hooman*, L. R. 10 Eq. 63.

(*g*) *Re Hams*, 10 Ir. Ch. R. 100.

(*h*) *Castle* v. *Downton*, 5 C. P. D. 56.

(*i*) *Lee* v. *Turner*, 20 Q. B. D. 373.

(*k*) *Cooper* v. *Davis*, 32 W. R. 329, C. A.

(*l*) *Trousdale* v. *Shephard*, 14 Ir. C. L. R. 370.

(*m*) *Grant* v. *Shaw*, L. R. 7 Q. B. 700.

(*n*) *Luckin* v. *Hamlyn*, 18 W. R. 43; *Exp. Chapman*, W. N. (1881) 109; 45 L. T. 268, C. A.

(*o*) *Usher* v. *Martin*, 61 L. T. 778.

(*p*) *Davies* v. *Jenkins*, (1900) 1 Q. B. 133.

(*q*) *Kemble* v. *Addison*, (1900) 1 Q. B. 430.

(*r*) *Neverson* v. *Seymour*, 97 L. T. 788.

(*s*) *Throssell* v. *Marsh*, 53 L. T. 321; *Exp. National Deposit Bank, Re Wills*, 26 W. R. 624. The rule appears to be different in Ireland. See *Re Fitzpatrick*, 19 L. R. Ir. 206.

(*t*) *Exp. Chapman, Re Davey*, 45 L. T. 268.

(*u*) *Exp. National Mercantile Bank*, 15 Ch. D. 42, C. A.

need not be described. But the ordinary occupation of a person should be stated, though he is out of employment at the time of making the affidavit (*x*).

xvi.—Renewal of Registration.—By sect. 11 of the Act of 1878, it is enacted as follows :—

Renewal of registration.

"The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and, if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void.

"The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale, and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.

"Every such affidavit may be in the form set forth in the schedule (A.) to this Act annexed.

"A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale."

A bill of sale, the registration of which has become void for want of renewal, cannot be renewed under sect. 14 of this Act, which empowers the Court to rectify the register on being satisfied that an omission to register, or a defect in the registration, was accidental or due to inadvertence, or under sect. 23, which prescribes the mode of renewing registration of bills made under the former Acts (*y*).

Effect of omission to re-register.

The Act of 1882 (*z*) does not apply to any bill of sale registered before its commencement unless avoided by non-renewal or otherwise ; and if the registration of a bill of sale becomes void by omission to renew, the bill will still be good as between grantor and grantee (*a*). So a subsequent bill of sale given by the grantee and registered will be good as against an execution creditor of the first grantor who was not in existence at the time when the second bill was given (*b*). *Secus* where the second bill of sale is not registered (*c*).

(*x*) *Sharp* v *McHenry* (No. 2), 38 Ch. D. 427.

(*y*) *Re Emery, Exp. Off. Rec.*, 21 Q. B. D. 405, C. A.

(*z*) See sect. 3 of that Act.

(*a*) *Cookson* v. *Swire*, 9 App. Ca. 653.

(*b*) *Antoniadi* v. *Smith*, (1901) 2 K. B. 589, C. A.

(*c*) *Hopkins* v. *Gudgeon*, (1906) 1 K. B. 690.

But a bill of sale registered since the commencement of this Act (*d*) will be void for all purposes unless duly re-registered (*e*).

The affidavit.

The affidavit must state the name and residence stated in the bill of sale, although they be erroneous (*f*). It is sufficient if the residence of the witness is stated in the introductory part of the affidavit, although it is not in the body (*g*).

xvii.—The Register.—By sect. 12 of the Act of 1878, it is enacted as follows :—

Form of register.

> "The registrar shall keep a book (in the Act called 'the register') for the purposes of the Act, and shall, upon the filing of any bill of sale or copy under the Act, enter therein in the form set forth in the second schedule (B.) to the Act annexed, or in any other prescribed form, the name, residence, and occupation of the person by whom the bill was made or given (or in case the same was made or given by any person under or in the execution of process, then the name, residence, and occupation of the person against whom such process was issued), and also the name of the person or persons to whom or in whose favour the bill was given, and the other particulars shown in the said schedule or to be prescribed under the Act, and shall number all such bills registered in each year consecutively, according to the respective dates of their registration.
>
> "Upon the registration of any affidavit of renewal the like entry shall be made, with the addition of the date and number of the last previous entry relating to the same bill, and the bill of sale or copy originally filed shall be thereupon marked with the number affixed to such affidavit of renewal.
>
> "The registrar shall also keep an index of the names of the grantors of registered bills of sale with reference to entries in the register of the bills of sale given by each such grantor."

By sect. 14 of the same Act it is enacted that—

Rectification of register.

> "Any judge of the High Court of Justice, on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such

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(*d*) 31st October, 1882.

(*e*) *Fenton* v. *Blythe*, 25 Q. B. D. 417.

(*f*) *Exp. Webster*, *Re Morris*, 22 Ch. D. 136.

(*g*) *Blaiberg* v. *Parke*, 10 Q. B. D. 90.

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terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct."

The Court of Appeal has no jurisdiction under this section (*h*).

The jurisdiction of a judge, under this section, as to rectification is limited to the register, and does not enable him to rectify mistakes in the affidavit (*i*). Possibly, however, an extension of time for registration might be granted under this section so as to enable a fresh affidavit to be filed (*k*).

The jurisdiction will not be exercised after third parties have acquired rights (*l*); and the time of registration or re-registration cannot be extended, so as to defeat the right of an execution creditor (*m*) or of a trustee in bankruptcy (*n*).

The section is not retrospective (*o*).

By sect. 16 it is enacted as follows :—

Office copies.

"Any person shall be entitled to have an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, or copy thereof, and of any affidavit filed therewith, if any, or registered affidavit of renewal, upon paying for the same at the like rate as for office copies of judgments of the High Court of Justice; and any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all Courts and before all arbitrators or other persons, be admitted as *primâ facie* evidence thereof, and of the fact and date of registration as shown thereon."

By sect. 16 of the Act of 1882 (repealing in part sect. 16 of the Act of 1878), any person may search the registry on payment of one shilling or other prescribed fee, and inspect and make extracts from registered bills of sale; which extracts are limited to the date of execution, and other prescribed particulars.

The office copy of the registry was held valid evidence under 14 & 15 Vict. c. 99, s. 14 (*p*).

The book kept under the Act is within 13 & 14 Vict. c. 99, s. 44, and a certified copy of it is admissible in evidence, and as

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(*h*) *Exp. Webster*, *Re Morris*, 48 L. T. 295.

(*i*) *Crew* v. *Cummings*, 21 Q. B. D. 420, C. A.

(*k*) *Re Dobbins' Settlement*, 56 L. J. Q. B. 295.

(*l*) See, however, *Re Spiral Globe Co.*, (1902) 1 Ch. 396.

(*m*) *Crew* v. *Cummings*, *supra*.

(*n*) *Re Parsons*, *Exp. Furber*, (1893) 2 Q. B. 122, C. A.

(*o*) *Re Emery*, *Exp. Off. Rec.*, 21 Q. B. D. 405, C. A.

(*p*) *Sutton* v. *Bath*, 3 H. & N. 382; *Grindall* v. *Brendon*, 6 C. B. N. S. 698.

the bill of sale and affidavit must be filed simultaneously, the date of the affidavit can be inferred from the date of filing the bill (q).

A copy of a bill of sale is not to be filed in any Court, unless the original, duly stamped, is produced to the proper officer (r).

Fees.

As to fees, see sects. 18 and 19 of the Act of 1878.

xviii.—Transfers and Assignments of Bills of Sale.— Sect. 10 of the Act of 1878 further enacts that—

Transfers, &c. need not be registered.

> "A transfer or assignment of a registered bill of sale need not be registered."

Transfer and further charge.

If, upon a transfer, a further sum is advanced, the deed is an effectual security for the amount owing in respect of the original advance without registration (s); but it would seem doubtful whether the deed, unless registered, would be a valid security for the further sum (t).

Sub-mortgage by deposit of bill of sale.

A memorandum by way of sub-mortgage given by the holder of a registered bill of sale, accompanied by a deposit of the bill, is within the protection of this section, and does not require registration, though the transferee subsequently acquires the equity of redemption under the bill of sale (u).

Registration of transfer will not validate unregistered bill of sale.

The grantee of a bill of sale cannot by assignment pass to the assignee a better title than he has himself (x); and, accordingly, where a grantee under an unregistered bill of sale assigned the goods comprised therein by a bill of sale duly registered, it was held that the want of registration of the original bill vitiated the title of the assignee (y).

If there is neither registration nor possession taken by the assignee, the assignee's title is not in general good against an execution creditor of the grantor (z).

Assignee must re-register.

Though the assignment need not be registered, the assignee must re-register the original bill of sale every five years (a).

(q) *Grindall* v. *Brendon*, *sup.*

(r) Stamp Act, 1893 (56 & 57 Vict. c. 41), s. 41.

(s) *Horne* v. *Hughes*, 6 Q. B. D. 676, C. A.

(t) *Ibid.*, at p. 683. See *Wale* v. *Commissioners of Inland Revenue*, 4 Ex. D. 270.

(u) *Exp. Turquand*, *Re Parker*, 14 Q. B. D. 636, C. A.

(x) *Exp. Odell*, *Re Walden*, 39 L. T. 333; this point is not referred to in *S. C.*, 10 Ch. D. 76.

(y) *Chapman* v. *Knight*, 5 C. P. D. 308; but see *Antoniadi* v. *Smith*, (1901) 2 K. B. 589.

(z) *Antoniadi* v. *Smith*, (1901) 2 K. B. 589; *Hopkins* v. *Gudgeon*, (1906) 1 K. B. 690.

(a) *Karet* v. *Kosher Meat Association*, 2 Q. B. D. 361.

xix.—Vacation of Bills of Sale.—A bill of sale is vacated without re-assignment by a memorandum of satisfaction in the prescribed manner.

By sect. 15 of the Bills of Sale Act, 1878, it is enacted that :—

Entry of satisfaction.

"Subject to and in accordance with any rules to be made under and for the purposes of this Act, the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale upon the prescribed evidence being given that the debt, if any, for which such bill of sale was made or given has been satisfied or discharged."

By the Rules of the Supreme Court, O. LXI. (*b*), it is provided as follows :—

Memorandum of satisfaction of bills of sale.

R. 26. "A memorandum of satisfaction may be ordered to be written upon a registered copy of a bill of sale, on a consent to the satisfaction, signed by the person entitled to the benefit of the bill of sale, and verified by affidavit, being produced to the registrar and filed in the Central Office."

Order for memorandum of satisfaction.

R. 27. "Where the consent in the last preceding rule mentioned cannot be obtained, the registrar may, on application by summons, and on hearing the person entitled to the benefit of the bill of sale, or on affidavit of service of the summons on that person, and in either case on proof to the satisfaction of the registrar that the debt (if any) for which the bill of sale was made has been satisfied or discharged, order a memorandum of satisfaction to be written upon a registered copy thereof."

Affidavit.

The affidavit verifying the signature and consent of the person entitled to the benefit of a bill of sale to the entry of satisfaction of the bill of sale need not be made by a solicitor (*c*).

Act of 1878, s. 20.

xx.—Order and Disposition Clause in Bankruptcy.—The registration of an absolute bill of sale of itself gives the notoriety which excludes the application of the doctrine of reputed ownership, for it was thus enacted by sect. 20 of the Act of 1878 :—

Order and disposition.

"Chattels comprised in a bill of sale which has been and continues to be duly registered under the Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the B. A. 1869" (*d*).

(*b*) A form of summons and affidavit is given.

(*c*) *Re White and Rubery*, (1894) 2 Q. B. 923. See Practice Masters' Rules, 25.

(*d*) 32 & 33 Vict. c. 71.

Repeal of sect. 20.

This section has been repealed only in respect of bills of sale given by way of security (*e*), and it still applies to and protects bills given by way of security and registered under the Act of 1878 (*f*). The effect of the repeal, as regards bills given since November, 1882, by way of security for the payment of money, is to restore the rule under the Act of 1854, under which it was held that registration did not exclude the doctrine of reputed ownership (*g*).

The question whether chattels comprised in a bill of sale are in the reputed ownership of the grantor, with consent of the true owner, is not affected by the provisions of sect. 7 of the Act of 1882 (*h*). And where a person is in possession of chattels of which he has executed a bill of sale, and subsequently becomes bankrupt before making any default under the bill of sale, such chattels are deemed to be in the order and disposition of the bankrupt, with the consent of the true owner (*i*).

The clause in the Bankruptcy Act, 1883, protecting conveyances or assignments by bankrupts for valuable consideration, if made before the date of the receiving order in good faith and without notice, has no operation as regards a transaction void under the Bills of Sale Acts (*k*).

(*e*) Act of 1882, ss. 3, 15. See *Swift* v. *Pannell*, 24 Ch. D. 210; *Reeves* v. *Barlow*, 12 Q. B. D. 436, C. A.

(*f*) *Exp. Izard, Re Chapple*, 23 C. D. 409, C. A.

(*g*) *Stansfeld* v. *Cubitt*, 2 De G. & J. 222; *Badger* v. *Shaw*, 29 L. J. Q. B. 73; *Exp. Harding, Re Fairbrother*, L. R. 15 Eq. 223.

(*h*) *Re Ginger, Exp. London and Universal Bank*, (1897) 2 Q. B. 461.

(*i*) *Ibid.*; *Re Hayes*, (1899) 2 Ir. R. 206; *Re Elliott*, 84 L. T. 325.

(*k*) *Exp. Attwater*, 5 Ch. D. 27, C. A.

CHAPTER XV.

MORTGAGES OF SHIPS, FREIGHT AND CARGO.

SECTION I.

MORTGAGES OF SHIPS AND SHARES THEREIN.

Ship not a chattel passing by delivery.

i.—Registration of British Ships and of Owners of Ships and Shares.—A ship is not like an ordinary chattel; it does not pass by delivery, nor does the possession of it prove the title to it. There is no market overt for ships (*a*).

Statute law as to mortgages of ships.

Mortgages of British ships have long been the subject of statutory regulations, which were so strict in regard to defects in the assurance as almost to oust the jurisdiction of equity: but all former statutes have been repealed by the Merchant Shipping Act, 1894 (*b*), which has consolidated the previous law on the subject.

Merchant Shipping Act, 1894.

Mortgages of British ships are now exclusively regulated by the Merchant Shipping Act, 1894 (*b*). This Act substantially re-enacts the provisions relating to or affecting mortgages of ships and shares contained in the former Acts, and accordingly the decisions on those Acts appear for the most part to be in force in determining the construction of the present Act and the rights of parties thereunder.

Meaning of term "British ship."

A British ship within the meaning of the Act is a ship the owners of which comply with the qualifications as to birth, naturalization, or denization mentioned in the Act, but not British-born persons bearing allegiance to a foreign State; also bodies corporate established under and subject to the laws of, and having their principal place of business in, some part of his Majesty's dominions (*c*).

(*a*) *Hooper* v. *Gumm*, L. R. 2 Ch. 290.

(*b*) 57 & 58 Vict. c. 60, amended by 6 Edw. 7, c. 48.

(*c*) 57 & 58 Vict. c. 60, s. 1.

Registration of British ships.

Every British ship must be registered, and will not be recognized as a British ship until registered, in manner prescribed by the Act (*d*).

Division of ship into sixty-four shares.

In contemplation of the Act a ship is divided into sixty-four shares, and any one or more shares, but not a fractional part of a share, may be the subject of mortgage under the Act (*e*).

The Act of 1894 enacts as follows :—

Register book.

Sect. 5. "Every registrar of British ships shall keep a book to be called the register book, and entries in that book shall be made in accordance with the following provisions:—

(1.) The property in a ship shall be divided into sixty-four shares.

(2.) Subject to the provisions of this Act with respect to joint owners or owners by transmission, not more than sixty-four individuals shall be entitled to be registered at the same time as owners of any one ship; but this rule shall not affect the beneficial title of any number of persons or of any company represented by or claiming under or through any registered owner or joint owner.

(3.) A person shall not be entitled to be registered as owner of a fractional part of a share in a ship; but any number of persons, not exceeding five, may be registered as joint owners of a ship, or of any share or shares therein.

(4.) Joint owners shall be considered as constituting one person only as regards the persons entitled to be registered, and shall not be entitled to dispose in severalty of any interest in a ship, or in any share therein in respect of which they are registered.

(5.) A corporation may be registered as owner by its corporate name."

Entry of particulars in register book.

The Act of 1894, after providing for declarations as to ownership by individual owners and corporate bodies (*f*), and as to the evidence to be produced on the registry of a ship (*g*), proceeds, by sect. 11, to prescribe that the registrar shall enter in the register book particulars as to (1) the name and port of the ship ; (2) details as to her tonnage, build, and description ; (3) particulars of origin ; (4) names and descriptions of her registered owner or owners, and if there is more than one owner, the proportions in which they are interested.

By sects. 56 and 57 of the same Act it is enacted as follows:—

Notice of trusts not received.

Sect. 56. "No notice of any trust, express, implied, or constructive, shall be entered in the register book or be receivable by the

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(*d*) *Ibid.* s. 2.

(*e*) *Ibid.* ss. 5, 31.

(*f*) Sect. 9.

(*g*) Sect. 10.

registrar, and subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose in manner in this Act provided of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration."

Equities not excluded by Act.

Sect. 57. "The expression beneficial interest, whenever used in this part of this Act, includes interests arising under contract and other equitable interests, and the intention of this Act is, that without prejudice to the provisions of this Act for preventing notice of trusts from being entered in the register book, or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by this Act on registered owners and mortgagees, and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests, may be enforced by or against owners and mortgagees of ships in respect of their interest therein, in the same manner as in respect of any other personal property."

Evidence of equities.

Accordingly, where a transfer of a ship was executed in the form prescribed by s. 55 of the repealed Act of 1854, so as to be absolute in its terms, it was held that the owners were not precluded from showing that the transfer was intended to be as a security only (*h*).

Similarly, where a mortgage of a ship was made in the form prescribed by s. 66, and transferred according to the form prescribed by s. 73, it was held that the Court was at liberty, by virtue of the section above set out, in estimating the rights of the transferee of the mortgage, to consider not only the registered documents, but all the transactions relating to the loan (*i*).

Section 56 enables a purchaser of shares, who is also part owner, to apply part of the purchase-money in discharge of the vendor's debt to the ship in priority to a prior unregistered mortgage (*k*).

Certificates of registry.

Sects. 14 to 23 of the Act of 1894 contain provisions as to certificates of registry on which all changes of ownership must be indorsed; and, by s. 15, it is enacted that, "The certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatever, had or claimed by any

Custody of certificate.

(*h*) *Ward* v. *Beck*, 13 C. B. N. S. 668; *Innisfallen*, L. R. 1 A. & E. 72. See also *Keroula*, 11 P. D. 92.

(*i*) *Cathcart*, L. R. 1 A. & E. 314.

(*k*) *Barclay & Co.* v. *Poole*, (1907) 2 Ch. 284.

owner, mortgagee, or other person to, on, or in the ship" ; and the refusal to deliver it on demand to the person entitled to it for the purpose of navigation, officers of customs, or other person legally entitled to require it, is punishable by penalty.

Certificate cannot be pledged.

It is, therefore, illegal to pledge the certificate, and the person entitled to it for the purpose of navigation, though himself the pledger, may maintain an action (*l*), after demand for its delivery, and may recover damages for the wrongful detainer, in addition to his right to proceed for the penalty.

The Act of 1894 contains the following provisions as to transfers and transmission of ships and shares therein :—

Transfer of ships or shares.

> Sect. 24.—" (1.) A registered ship or a share therein (when disposed of to persons qualified to own a British ship) shall be transferred by bill of sale.
>
> " (2.) The bill of sale shall contain such description of the ship as is contained in the surveyor's certificate, or some other description sufficient to identify the ship to the satisfaction of the registrar, and shall be according to the form marked A. in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by, a witness or witnesses."

Declaration of transfer.

By s. 25, it is provided that a transferee shall not be registered until he, or, in the case of a corporation, the proper officer, has made a declaration stating his qualification, or that of the corporation, to be registered as owner ; and that no unqualified person or body of persons is entitled as owners to any legal or beneficial interest in the ship or any share therein.

Register of transfer.

By s. 26, upon production to the registrar of the transfer and prescribed declaration, he is to enter in the register book the name of the transferee, and to indorse on the transfer the fact of such entry, with the date and hour thereof. Transfers are to be registered in the order of their production to the registrar.

Validity of transfer in bankruptcy.

The mere transfer of a ship under s. 24 gives the transferee a good title against the trustee in bankruptcy of the transferor, although, until registration, he could not transfer it to a purchaser under s. 26 (*m*).

Improper transfer.

A registration founded on a sale by an attorney in excess of his power was held to give no title, even at law, to the person

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(*l*) *Wiley* v. *Crawford*, 1 B. & S. 253, 265.

(*m*) *Stapleton* v. *Haymen*, 2 H. & C. 918.

thereby registered as owner (*n*); and a re-transfer was directed to be executed by a person who had been registered as owner under a mistake as to title (*o*).

Expunging entry.

The Court has jurisdiction to make an order that the entry of an invalid mortgage of a ship be expunged from the register (*p*).

Distinction between legal and equitable interests.

In the transfer of a British ship, there is a clear distinction between the legal estate and mere beneficial interests therein. A sale of the beneficial interest by licitation, without a bill of sale, does not entitle the purchaser to be registered as owner (*q*).

Transmission of property in ship on death, marriage, bankruptcy, &c.

Sect. 27 of the Act provides that, "where the property in a registered ship or share therein is transmitted to a person qualified to own a British ship on the marriage, death, or bankruptcy of any registered owner, or by any lawful means other than by a transfer under this Act," such transmission shall be authenticated by means of a declaration of transmission identifying the ship and containing prescribed statements, and accompanied by certain prescribed evidence; and that the registrar, on receipt of the declaration of transmission so accompanied, is to enter in the register book the name or names of the person or persons entitled to be registered by virtue of the transmission.

Precautions to be taken by mortgagee of transferred or transmitted ship.

If a ship or a share or shares therein intended to form the security for a loan have passed from the original owner by transfer or transmission, the intending mortgagee should satisfy himself, by inspection of the documents of title and the register book, that the required formalities have been observed, so as to confer a good title to the property (*r*).

Mortgages on ships sold to foreigners.

As to the power of the Court to enforce unsatisfied mortgages on ships sold to foreigners, see Merchant Shipping Act, 1906, s. 52 (2) (*s*).

ii.—Form and Registration of Mortgages of Ships and Shares.—With regard to mortgages of ships and shares in ships, the Act of 1894 contains the following enactments:—

Mortgage of ship or share.

Sect. 31.—"(1.) A registered ship, or a share therein, may be

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(*n*) *Orr* v. *Dickenson*, John. 1.

(*o*) *Holderness* v. *Lamport*, 29 Beav. 129.

(*p*) *Brond* v. *Broomhall*, (1906) 1 K. B. 571.

(*q*) *Chasteauneuf* v. *Capeyron*, 7 App. Ca. 127.

(*r*) *Stapleton* v. *Haymen*, 2 H. & C. 918.

(*s*) 6 Edw. 7, c. 48, s. 52 (2).

made a security for a loan or other valuable consideration, and the instrument creating the security (in this Act called a mortgage) shall be in the form marked B. in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument the registrar of the ship's port of registry shall record it in the register book.

"(2.) Mortgages shall be recorded by the registrar in the order in time in which they are produced to him for that purpose, and the registrar shall by memorandum under his hand notify on each mortgage that it has been recorded by him, stating the date and hour of that record."

The mortgage or transfer of mortgage is exempt from stamp duty (*t*). As to the fees payable, see Merchant Shipping (Mercantile Marine Fund) Act, 1898, s. 3 (*u*).

What passes by mortgage of ship.

A mortgage of a ship passes, as incident thereto, all articles necessary to the navigation of the ship or to the prosecution of the adventure which were on board at the date of the mortgage, and articles brought on board subsequently to the mortgage in substitution for the same (*x*). *A fortiori*, if the mortgage is expressed to be of a ship "with the appurtenances," the term "appurtenances" will pass to the mortgagee anything which is on board for the accomplishment of the voyage and of the adventure (*y*). So a chronometer was held to pass to the mortgagee as an "appurtenance" of the ship (*z*). But cargo will not pass as an "appurtenance" (*a*).

Forms of documents, and instructions as to registry.

By sect. 65 of the Act, mortgages not in the prescribed form are not to be registered, except by direction of the Commissioners of Customs; but the Commissioners may from time to time, with the consent of the Board of Trade, alter the forms, upon giving public notice of such alterations.

Mortgage in blank.

A mortgage of shares in a ship executed in blank by the legal owner is a nullity as against the beneficial owner (*b*).

Discrepancy between mortgage and register.

A slight difference between the mortgage and the register in the name of the ship is of no consequence, if there is no doubt as to the identity; as where the mortgage was of the "City of Bruxelles," registered as the "City of Brussels" (*c*).

Unregistered mortgage.

A mortgage is binding between the mortgagee and mort-

(*t*) *Ib.* s. 721. See *Deddington Co.* v. *Commissioners*, (1911) 2 K. B. 1001.

(*u*) 61 & 62 Vict. c. 44.

(*x*) *Coltman* v. *Chamberlain*, 25 Q. B. D. 328; *Hull Rope Co.* v. *Adams*, 65 L. J. Q. B. 114.

(*y*) *Dundee*, 1 Hagg. 109; *S. C.*, *sub nom. Gale* v. *Laurie*, 5 B. & Cr. 162.

(*z*) *Langton* v. *Horton*, 1 Ha. 549.

(*a*) *Post*, p. 289.

(*b*) *Burgis* v. *Constantine*, (1908) 2 K. B. 484, C. A.

(*c*) *Bell* v. *Bank of London*, 3 H. & N. 730.

gagor, though the requisites of the registry are not complied with (*d*).

Collateral agreement.

Mortgages in the prescribed form may properly be supplemented by unregistered collateral agreements (*e*).

Right of insurer.

The right of an insurer of ships who is, but does not appear on the register as, the mortgagee to the proceeds of the policies is not affected by the Acts (*f*).

Deposit of policy.

A security by way of deposit of a policy on a ship at sea, which is afterwards injured and condemned, may give the depositee authority to sue on the policy, but it passes no property in the ship, and does not authorize the depositee to give notice of abandonment as for a total loss (*g*).

Exception of mortgages of ships from Bills of Sale Acts.

Mortgages of British ships and shares therein are excepted from the operation of the Bills of Sale Acts (*h*), and accordingly do not require to be made according to the form prescribed by the Bills of Sale Act, 1882, nor to be registered under those Acts (*i*). And such mortgages will be within the exception, though not made according to the form prescribed by, nor registered under, the Merchant Shipping Act, 1894 (*k*).

Fittings, &c. of ships.

All articles and materials passing by a mortgage of a ship by the word "appurtenances" are protected by the exception, so as to exempt the security by which they pass from the necessity of registration under the Bills of Sale Acts (*l*).

Unfinished ship.

A mortgage may be given without such registration on an unfinished ship in course of building which will effectually pass not only the ship itself but all things prepared for, though not actually attached to, the ship (*m*). And a valid charge may similarly be given on a builder's interest in an unfinished ship by deposit of the builder's certificate (*n*).

Certificates of mortgage.

If a registered owner is desirous of mortgaging at any place out of the country in which the port of registry is situate, the registrar may enable him to do so by granting a "certificate of mortgage" giving him a power to mortgage (*o*). Previously to

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(*d*) *Lister* v. *Payn*, 11 Sim. 348. See *Barclay* v. *Poole*, (1907) 2 Ch. 284.

(*e*) *Benwell Tower*, 72 L. T. 664. See also *Innisfallen*, L. R. 1 A. & E. 72; *Cathcart*, L. R. 1 A. & E. 314.

(*f*) *Ladbroke* v. *Lee*, 4 De G. & S. 106.

(*g*) *Jardine* v. *Leathley*, 3 B. & S. 700.

(*h*) 41 & 42 Vict. c. 31, s. 4; 45 & 46 Vict. c. 43.

(*i*) See *ante*, p. 211.

(*k*) *Union Bank of London* v. *Lenanton*, 3 C. P. D. 243.

(*l*) *Coltman* v. *Chamberlain*, 25 Q. B. D. 328, 331. See *ante*, p. 275.

(*m*) *Reid* v. *Fairbanks*, 1 C. L. R. 787; *Woods* v. *Russell*, 5 B. & Ald. 942.

(*n*) *Exp. Hodgkin* (or *Winter*), *Re Softley*, L. R. 20 Eq. 746.

(*o*) Sect. 39.

the grant of a certificate, entries must be made in the register book of the names of the persons by whom the power is to be exercised and the maximum amount of the charge to be created, and the place where, and the limit of time within which, the power is to be exercised (*p*). A certificate is not to be granted so as to authorize a mortgage within the United Kingdom if the port of registry is within the United Kingdom, or in any British possession in which the port of registry is situate, or at or within the area of any port of registry established by Order in Council, or by any person not named by the certificate (*q*). Certificates of mortgage must contain a statement of the particulars directed to be entered in the register book, and an enumeration of any registered mortgages or certificates of mortgage or sale affecting the ship or shares in respect of which the certificate is given (*r*).

Rules as to certificates of mortgage.

Sect. 43. "The following rules shall be observed as to certificates of mortgage:—

(1.) The power shall be exercised in conformity with the directions contained in the certificate.

(2.) Every mortgage made thereunder shall be registered by the indorsement of a record thereof on the certificate by a registrar or British consular officer.

(3.) A mortgage made in good faith thereunder shall not be impeached by reason of the person by whom the power was given dying before the making of the mortgage.

(4.) Whenever the certificate contains a specification of the place at which, and a limit of time not exceeding twelve months within which the power is to be exercised, a mortgage made in good faith to a mortgagee without notice, shall not be impeached by reason of the bankruptcy of the person by whom the power was given.

(5.) Every mortgage which is so registered as aforesaid on the certificate shall have priority over all mortgages of the same ship or share created subsequently to the date of the entry of the certificate in the register book; and if there are more mortgages than one so registered, the respective mortgagees claiming thereunder shall, notwithstanding any express, implied, or constructive notice, be entitled, one before the other, according to the date at which each mortgage is registered on the certificate, and not according to the date of the mortgage.

(6.) Subject to the foregoing rules, every mortgagee whose mortgage is registered on the certificate shall have the same rights and powers, and be subject to the same

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(*p*) Sect. 40.

(*q*) Sect. 41.

(*r*) Sect. 42.

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liabilities, as he would have had and been subject to if his mortgage had been registered in the register book instead of on the certificate.

(7.) The discharge of any mortgage so registered on the certificate may be indorsed on the certificate by any registrar or British consular officer, upon the production of such evidence as is by this Act required to be produced to the registrar on the entry of the discharge of a mortgage in the register book; and on that indorsement being made, the interest, if any, which passed to the mortgagee shall vest in the same person or persons in whom it would (having regard to intervening acts and circumstances, if any,) have vested if the mortgage had not been made.

(8.) On the delivery of any certificate of mortgage to the registrar by whom it was granted, he shall, after recording in the register book, in such manner as to preserve its priority, any unsatisfied mortgage registered thereon, cancel the certificate and enter the fact of the cancellation in the register book; and every certificate so cancelled shall be void to all intents."

Mortgagor in possession.

iii.—Rights and Liabilities of Mortgagee in Possession.—So long as the mortgagee of a ship does not take possession, the mortgagor, as the registered owner subject to the mortgage, retains all the rights and powers of ownership, and his contracts with regard to the ship will be valid and effectual, and bind the mortgagee, provided that his dealings do not materially impair the mortgagee's security.

Mortgagee not treated as owner.

Sect. 34. " Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not, by reason of the mortgage, be deemed the owner of a ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof."

Mortgagee to have power of sale.

Sect. 35. " Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but where there are more persons than one registered as mortgagees of the same ship or share, a subsequent mortgagee shall not, except under the order of a Court of competent jurisdiction, sell the ship or share without the concurrence of every prior mortgagee."

Jurisdiction of Admiralty Division.

The Admiralty Division of the High Court has jurisdiction over any claims in respect of any mortgage duly registered according to the provisions of the Act, whether the ship or the proceeds thereof be under the arrest of the Court or not, and will enforce equities between owners and mortgagees of ships (*s*).

Rights of mortgagor in possession to user of ship and to freight.

The position of a mortgagor in possession is thus stated by Lord Cairns, C., in the leading case of *Keith* v. *Burrows* (*t*): "The mortgagee of a ship does not, ordinarily speaking, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship in any particular way, or, indeed, to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world not earning freight, but for the purpose of bringing home goods of his own or for his own benefit. Those goods which are brought home for him he may sell at their full market price when they arrive in this country, thereby, of course, bringing into his own pocket not merely the original value of the goods, but also the portion of remuneration which represents the value of the carriage of those goods from abroad. Or, again, he may, in making, through his master, a contract for freight at a foreign port, attach to the carriage of the goods a rate of freight, which may either be nominal or may be very far under the ordinry rate of freight of the market. All those acts would be the ordinary incidents of the ownership of the mortgagor, who remains the *dominus* of the ship with regard to everything connected with its employment, until the moment arrives when the mortgagee takes possession. If the mortgagee is dissatisfied with the amount of authority which the mortgagor possesses by law, it is for him to put an end to the opportunity of exercising that authority by taking the control of the ship out of the hands of the mortgagor."

Mortgagor may bind mortgagee by charterparty or by lien for repairs.

So, where a mortgagor had made a charterparty, which was not shown to be in any way prejudicial to the security, the mortgagees were bound by it (*u*). And a mortgagee permitting the mortgagor to retain possession and to use the ship, is bound by the lien for repairs of a shipwright to whom it was delivered by the mortgagor for that purpose (*x*).

Cesser of rights of mortgagor in possession on default.

But if a mortgagor does any act or is guilty of any default which prejudices or injures the security of the mortgagee,

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(*s*) Admiralty Court Jurisdiction Act, 1861 (24 Vict. c. 10, s. 11); *Cathcart*, L. R. 1 A. & E. 314. See Short Cause Rules, 1908.

(*t*) 2 App. Ca. 636, at p. 645.

(*u*) *Fanchon*, 5 P. D. 173. See also *Collins* v. *Lamport*, 4 De G. J. & S. 500, 505; *Blanche*, 58 L. T. 592.

(*x*) *Williams* v. *Allsup*, 10 C. B. N. S. 417; *Collins* v. *Lamport*, *sup.*

sect. 34 ceases to have any binding effect against the mortgagee, subject, as it would seem, to any subsisting contracts entered into by the mortgagor while in possession, of which the mortgagee has notice, or which are consistent with the ordinary use of the ship (*y*). And, in order to obtain the benefit of such contracts, the mortgagee must give notice to the other contracting party (*z*). So where an owner had agreed with his mortgagee to insure the ship and subsequently chartered her, the mortgagee was entitled to prevent her from sailing uninsured (*a*).

Contract impairing security.

Where mortgagors in possession of a ship entered into a charterparty for the carriage of contraband of war without insuring against the risk of capture, the mortgagees were entitled to a declaration that the charterparty was not binding on them since it impaired their security (*b*).

Mortgagee's right to possession.

If the mortgagor impairs the security by allowing the ship to become subject to liens for necessaries which he is unable to discharge, the mortgagee is entitled to take possession although there has been no actual default in payment under the mortgage, and though the mortgagee has not commenced any formal proceedings (*c*).

Matters affecting mortgagee not in possession.

A mortgagee not in possession cannot be compelled to join in a charterparty (*d*). He cannot maintain an action of restraint (*e*); nor can he recover passage-money received by the mortgagor before taking possession (*f*).

Rights of mortgagee of shares in ship on taking possession.

A mortgagee of the majority of the shares in a ship can take possession, but he is only entitled to his mortgagor's part of the profit-freight after contributing proportionately with the other co-owners to the expenses of the outfit and of the voyage (*g*). He is not entitled himself to interfere with the control of the ship; he cannot after the making of the charterparty arrest the ship, or demand bail in an action on his mortgage, provided the performance of the charterparty is not prejudicial to his security (*h*); and, as regards the future control of the

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(*y*) *Celtic King*, (1894) P. 175, at p. 187. And see *post*, p. 284.

(*z*) *Collins* v. *Lamport*, *sup.*

(*a*) *Laming & Co.* v. *Seator*, 16 C. of S. Ca. (Sc.) 828, 4th Ser.

(*b*) *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade*, (1905) 1 K. B. 815.

(*c*) *The Manor*, (1907) P. 339, C. A.

(*d*) *Samuel* v. *Jones*, 7 L. T. N. S. 760.

(*e*) *Innisfallen*, L. R. 1 A. & E. 72.

(*f*) *Willis* v. *Palmer*, 6 Jur. N. S. 732.

(*g*) *Alexander* v. *Sims*, 5 De G. M. & G. 80.

(*h*) *Maxima*, 39 L. T. 112.

ship, it seems that he can only take possession by giving notice of his mortgage to the ship's husband (*i*), and claiming thereby a proportionate part of the profit-freight (*k*).

Where the mortgagor of shares is also the ship's husband, if the mortgagee joins with the owners of the other shares in the appointment of a new ship's husband before the completion of a voyage, the mortgagor loses all right, as ship's husband, to receive the freight, but he will have a lien on the freight for advances repaid by him on account of the ship previous to his removal (*l*).

A mortgagee of a minority of shares, however, is not entitled to take possession, but he can by giving notice to the person having the management of the ship claim a proportionate part of the freight (*m*).

Exemption of mortgagees from penalties.

The provisions in the statute (*n*) that persons beneficially interested in ships and shares therein shall, as well as the registered owner, be subject to pecuniary penalties imposed upon owners, except persons who are beneficially interested by way of mortgage.

Duty of mortgagee in possession.

The duty of a mortgagee who has taken possession of a ship is to sell as soon as conveniently may be, but he is justified in employing the ship for a reasonable time to avoid selling. So where a mortgagee, instead of selling the ship, employed it in hazardous and speculative adventures, and made great losses, he was charged with the value of the ship and fittings at the time he ought to have sold it (*o*).

Liability for injury to ship.

What is said by Holt, C. J., in *Coggs* v. *Bernard*, against the use of any chattel bailed by way of necessity, which might be injured during the use made of it, cannot apply to the mortgage of a ship (*p*).

(*i*) The "ship's husband" is an agent specially appointed by the owner or co-owners of a ship to superintend the equipment, repairs, management, and other concerns of the ship. Where there are several owners, one of them is generally appointed managing owner or ship's husband. A ship's husband has the authority of the owners to procure a charterparty and generally to make contracts for their benefit; but he cannot cancel a charterparty. *Thomas* v. *Lewis*, 4 Ex. D. 23. The name and address of the managing owner, ship's husband or other manager for the time being, must be registered at the port of registry of the ship. See Merchant Shipping Act, 1894, s. 59.

(*k*) *Maxima*, 39 L. T. 112.

(*l*) *Beynon* v. *Godden*, 3 Ex. D. 263, C. A.

(*m*) *Green* v. *Briggs*, 6 Ha. 395; *Cato* v. *Irving*, 5 De G. & S. 210; *Essarts* v. *Whinney*, 88 L. T. 191.

(*n*) Sect. 58.

(*o*) *Marriott* v. *Anchor Reversionary Society*, 3 De G. F. & J. 117; *De Mattos* v. *Gibson*, 1 J. & H. 83. And see *European, &c. Co.* v. *Royal Mail, &c. Co.*, 4 K. & J. 676.

(*p*) Ld. Raym. 909, 916.

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Liability of mortgagee for repairs, &c.

So long as the mortgagor, being in possession, continues, by virtue of sect. 34, to be the owner of the ship, the mortgagee incurs no liability as to repairs or necessaries by reason of his legal title, nor is his security postponed to or affected by a claim in respect of necessaries, unless the payment for them is made with the sanction of the Court (*q*); but if the mortgagee enters into possession, he will be liable for repairs and necessaries ordered by his authority, and his legal title and actual possession, in that case, render the captain his agent for the purpose of implying such authority (*r*).

But neither the owner nor mortgagee of the majority of the shares in a ship, who is in possession, can recover from the mortgagees of other shares a proportionate part of payments made without their request (*s*).

Where a ship was mortgaged together with policies of insurance effected thereon, the mortgagee was held entitled to retain the proceeds of the policies without paying the costs of the repairs done to the ship (*t*).

A mortgagee taking possession does not render himself personally liable for expenses incurred by the mortgagor for the purposes of the voyage (*u*).

Costs of taking possession.

If a mortgagee pays necessary expenses in order to obtain possession of the ship, he is entitled to recover the money from the mortgagor or other person liable to pay such expenses (*x*).

In an action to redeem the mortgage of a ship, the expenses of taking and holding possession of the ship are properly chargeable as "just allowances" under Ord. XXXIII. r. 8, without any direction in the decree for the purpose (*y*).

Right to freight.

A mortgagee who takes possession of a ship during a voyage becomes entitled to receive the unpaid freight earned in that voyage (*z*); but the earnings of a ship in the hands of a mortgagee are liable for the expenses of the voyage (*a*).

The mortgagee of a ship on taking possession is entitled to

(*q*) *Lyons*, 57 L. T. 818.

(*r*) *Hibbs* v. *Ross*, L. R. 1 Q. B. 534, and cases there cited; *Rusden* v. *Pope*, L. R. 3 Ex. 269, at p. 272; *Orchis*, 15 P. D. 38, C. A.

(*s*) *Ripon City* (No. 2), (1898) P. 78.

(*t*) *Swan and Cleland, &c.* v. *Maritime Insurance Co.*, (1907) 1 K. B. 116; 76 L. J. K. B. 160.

(*u*) *El Argentino*, (1909) P. 236.

(*x*) *Johnson* v. *Royal Mail Co.*, L. R. 3 C. P. 38; *Orchis*, 15 P. D. 38, C. A.; *Heather Bell*, (1901) P. 272, C. A.

(*y*) *Wilkes* v. *Saunion*, 7 Ch. D. 188.

(*z*) *Kerswell* v. *Bishop*, 2 Cr. & J. 529; *Dean* v. *M'Ghie*, 12 Moo. 185; *Chinnery* v. *Davidson*, 2 Br. & B. 379; *Keith* v. *Burrows*, 2 App. Ca. 636; *Japp* v. *Campbell*, 57 L. J. Q. B. 79.

(*a*) *Green* v. *Biggs*, 6 Ha. 395; *Alexander* v. *Sims*, 5 De G. M. & G. 57. See *supra*, note (*u*).

all unpaid freight which the ship is then in the course of earning, but not to freight previously earned and unpaid at the time of taking possession (*b*).

A mortgagee of the majority of shares in a ship is entitled on taking possession to receive the whole freight subject to his accounting to the other owners and to the payment of disbursements (*c*).

A mortgagee in possession of a ship will not be charged with wilful default for not concurring in a hazardous charterparty (*d*).

What acts amount to taking possession.

If the circumstances are such as to prevent a mortgagee from taking immediate possession, it seems that notice to the parties interested, followed by taking actual possession at the earliest opportunity, will be equivalent to possession as from the date of the notice.

So, where the mortgagee of a ship which was proceeding on a voyage gave notice to the mortgagor and the charterer claiming the freight, and took actual possession of the ship on its arrival at the port of destination, he was held to be entitled to the freight earned during the voyage (*e*).

Right of mortgagee in possession to cargo.

A mortgagee of a ship on taking possession is not entitled to seize cargo on board belonging to the mortgagor, unless such cargo is included in the security; and cargo will not be included by words of general import, such as "appurtenances" (*f*).

Control of ship.

A mortgagee who has taken possession obtains control of the ship, and if the master by order of the mortgagor interferes with such control he will be guilty of misconduct, and no compensation for dismissal can be awarded to him as against the mortgagee (*g*).

Receiver.

If a mortgagee of a ship is unable to arrest or otherwise obtain possession of the ship, he may, apparently, like any other mortgagee (*h*), obtain the appointment of a receiver.

When mortgagee's power of sale arises.

The statutory power of the mortgagee to arrest and sell the ship arises upon any default of the mortgagor in payment of principal or interest (*i*), or upon any act of default of the mortgagor imperilling or impairing their security (*k*), or upon any

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(*b*) *Shillito* v. *Biggart*, (1903) 1 K. B. 683.

(*c*) *Japp* v. *Campbell*, 57 L. J. Q. B. 79.

(*d*) *Samuel* v. *Jones*, 7 L. T. N. S. 760.

(*e*) *Rusden* v. *Pope*, L. R. 3 Ex. 269.

(*f*) *Langton* v. *Horton*, 5 Beav. 9. See *Brancker* v. *Molyneux*, 3 Man. & Gr. 84.

(*g*) *Fairport*, 10 P. D. 13.

(*h*) *Truman* v. *Redgrave*, 18 Ch. D. 547.

(*i*) *Wilkes* v. *Saunion*, 7 Ch. D. 188. See *Cathcart*, L. R. 1 A. & E. 314, 327.

(*k*) *Collins* v. *Lamport*, 34 L. J. Ch.

breach by the mortgagor of the express terms of the mortgage contract. And the mortgagee must be careful to see that his exercise of the power of sale is justified by some such act or default (*l*), and that it is carried out in accordance with the terms of the statutory power or any stipulation modifying the same (*m*), otherwise he may be liable in damages.

How far he can sell free from mortgagor's contracts.

The mortgagee will be entitled to sell the ship free from any contracts entered into by the mortgagor which were subsisting at the time of the mortgage, but of which the mortgagee had no notice, or subsequent contracts which are so inconsistent with the ordinary use of the ship that the mortgagee could not be deemed to have authorized them by leaving the mortgagor in possession, or which are of such a nature as to impair the security (*n*). It has been seen that a mortgagee will be bound by contracts entered into by the mortgagor in possession subsequently to the mortgage which are reasonable and proper for the ordinary employment or maintenance of the ship (*o*).

Costs of sale.

Where a mortgagee seizes and proceeds to sell a ship under a power, he is entitled to charge the mortgagor with the costs of and incident to the sale (*p*).

iv.—Transfer and Transmission of Mortgages.—With regard to the transfer and transmission of mortgages, the Act of 1894 contains the following provisions:—

Transfer of mortgage.

Sect. 37. "A registered mortgage of any ship or share may be transferred to any person, and the instrument effecting the transfer shall be in the form marked C. in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument the registrar shall record it by entering in the register book the name of the transferee as mortgagee of the ship or share, and shall, by memorandum under his hand, notify on the instrument of transfer that it has been recorded by him, stating the date and hour of the record."

Transmission of interest of mortgagee by death, bankruptcy, marriage, &c.

Sect. 38.—"(1.) Where the interest of a mortgagee in a ship or share is transmitted on marriage, death, or bankruptcy, or by any lawful means, other than by a transfer under this Act, the transmission shall be authenticated by a declaration of the person to whom the interest has been transmitted, containing a statement of the manner in which and the person to whom the property has

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195; *Cathcart*, *sup.* See also *Blanche*, 6 Asp. N. S. 272.

(*l*) *Cathcart*, L. R. 1 A. & E. 314.

(*m*) *Brouard* v. *Dumaresque*, 3 Moo. P. C. 457.

(*n*) *Celtic King*, (1894) P. 175; *Heather Bell*, (1901) P. 272, C. A.

(*o*) *Ante*, pp. 279, 282.

(*p*) *Wilkes* v. *Saunion*, 7 Ch. D. 188.

been transmitted, and shall be accompanied by the like evidence as is by this Act required in case of a corresponding transmission of the ownership of a ship or share.

"(2.) The registrar, on the receipt of the declaration and the production of the evidence aforesaid, shall enter the name of the person entitled under the transmission in the register book as mortgagee of the ship or share."

v.—Discharge of Mortgage.—The Act enacts as follows as regards the discharge of mortgages:—

Entry of discharge of mortgage.

Sect. 32. "Where a registered mortgage is discharged, the registrar shall, on the production of the mortgage deed, with a receipt for the mortgage money indorsed thereon duly signed and attested, make an entry in the register book to the effect that the mortgage has been discharged, and on that entry being made, the estate (if any) which passed to the mortgagee shall vest in the person in whom (having regard to the intervening acts and circumstances, if any) it would have vested if the mortgage had not been made."

Mistake in entry.

Where the first mortgage is by mistake discharged on the registry, a subsequent registered mortgage has priority (*q*); but where the entry of discharge of a mortgage had been made by mistake, and a bill of sale by the mortgagee to a purchaser had consequently been refused, the Court directed the purchaser to be registered (*r*).

There is no provision which authorizes the registrar to erase entries of mortgages upon their being discharged (*s*). But the Court can expunge an entry of an invalid mortgage (*t*).

vi.—Disabilities.—Disabilities are thus provided for by the Act:—

Provision for cases of infancy or other incapacity.

Sect. 55. "Where, by reason of infancy, lunacy, or any other cause, any person interested in any ship, or any share therein, is incapable of making any declaration, or doing anything required or permitted by this Act to be made or done in connection with the registry of the ship or share, the guardian or committee, if any, of that person, or, if there is none, any person appointed, on application made on behalf of the incapable person, or of any other person interested, by any Court or judge having jurisdiction in respect of the property of incapable persons, may make such declaration, or a declaration as nearly corresponding thereto as circumstances permit, and do such act or thing in the name and

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(*q*) *Bell* v. *Blyth*, L. R. 4 Ch. 136.

(*r*) *The Rose*, L. R. 4 A. & E. 6; *Chasteauneuf* v. *Capeyron*, 7 App. Ca. 127.

(*s*) *Chasteauneuf* v. *Capeyron*, *sup.*

(*t*) *Ante*, p. 274.

on behalf of the incapable person; and all acts done by the substitute shall be as effectual as if done by the person for whom he is substituted."

On sale of a ship to an infant, the vendor is a trustee for the infant (*u*).

Sect. 55 of the Act does not enable the guardian of an infant shipowner to mortgage the ship for repairs, although it may be that, in the exercise of his necessary power to repair, a lien may be created upon the ship (*x*).

vii.—**Order and Disposition in Bankruptcy.**—If the mortgage of a ship, or any share therein, is duly registered according to the Merchant Shipping Act, 1894 (*y*), the rights of the mortgagee will not be subject to the order and disposition clause of the Bankruptcy Act, 1883 (*z*). By sect. 36 of the Act of 1894, it is enacted as follows:—

Mortgage not affected by bankruptcy.

"A registered mortgagee of a ship or share shall not be affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding that the mortgagor, at the commencement of his bankruptcy, had the ship or share in his possession, order, or disposition, or was reputed owner thereof, and the mortgage shall be preferred to any right, claim, or interest therein of the other creditors of the bankrupt, or any trustee or assignee on their behalf."

Mortgage after act of bankruptcy.

Where a mortgage is granted on a ship after the mortgagor has committed an act of bankruptcy in respect of which he is subsequently adjudicated bankrupt, the mortgage is protected by sect. 49 of the Bankruptcy Act if the mortgagee had no notice of the act of bankruptcy at the date of the mortgage, notwithstanding that the ship remains in the possession of the mortgagor up to the date of the receiving order (*a*).

Deposit of registered mortgages.

Where the registered mortgages of vessels were deposited by the mortgagees with their bankers, they were held not to be in the order and disposition of the mortgagees, for an assignment of a mortgage of a ship can only be made by indorsement on the instrument of mortgage (*b*).

(*u*) *Stapleton* v. *Haymen*, 2 H. & C. 918.

(*x*) *Michael* v. *Fripp*, L. R. 7 Eq. 95.

(*y*) 57 & 58 Vict. c. 60.

(*z*) 46 & 47 Vict. c. 52, s. 44 (iii).

(*a*) *The Ruby*, 83 L. T. 438.

(*b*) *Lacon* v. *Liffen*, 32 L. J. Ch. 315.

Unfinished ship.

As a general rule, an unfinished ship in the builder's yard is not within the clause (*c*).

A mortgage of an unfinished ship registered after the completion and registration of the ship was held to prevail against the trustee in bankruptcy of the owner of the ship (*d*).

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SECTION II.

MORTGAGES OF FREIGHT.

Meaning of term "freight."

Freight is the sum paid by a merchant or other person chartering a ship or part of a ship, or sending goods in a general ship for the use of such ship or part, or the conveyance of such goods during a specified voyage or for a specified time (*e*).

Meaning of term "charter-party."

A charterparty is an agreement in writing by which a shipowner agrees to let a ship or part of a ship for the carriage of goods on a specified voyage, or for a specified time, for a sum of money agreed to be paid for their carriage (*f*).

How freight is fixed.

If there is no charterparty, the freight is usually fixed by the bill of lading, but if no freight is expressly agreed upon, the fact that the goods were laden on a ship to be conveyed will raise an implication in law of a contract by the owner of the goods to pay for the carriage, the liability being controlled by the special custom of the trade (*g*).

When freight is earned.

Freight is not earned until the cargo is ready to be delivered to the consignee at the appointed place (*h*), in the absence of express stipulation to the contrary (*i*).

Separate assignment of freight.

It has been seen that a mortgage of a ship does not pass the right to the freight to the mortgagee until he takes possession.

(*c*) *Holderness* v. *Rankin*, 2 De G. F. & J. 258; *Exp. Watts*, 3 De G. J. & S. 394; *Swainston* v. *Clay*, 4 Giff. 187, varied on appeal, 3 De G. J. & S. 558; *McBain* v. *Wallace*, W. N. (1881) 127; 45 L. T. 261.

(*d*) *Bell* v. *Bank of London*, 3 H. & N. 730.

(*e*) Wharton's Law Lex. (6th ed.) 409.

(*f*) *Ibid.* 171.

(*g*) *Domett* v. *Beckford*, 5 B. & Ad. 521.

(*h*) *Cato* v. *Irving*, 5 De G. & S. 210; *Brown* v. *Tanner*, L. R. 3 Ch. 597. See *Moller* v. *Young*, 5 E. & B. 7, 755; *Sanders* v. *Vanzeller*, 4 Q. B. 277, 291; *Castel and Latta* v. *Trechman*, 1 C. & E. 276; *Turnbull* v. *Great Eastern and Peninsular Navigation Co.*, 1 C. & E. 595.

(*i*) As to the right to freight of the mortgagee of a ship, see *ante*, p. 282.

The freight, if in a charterparty, may be assigned independently of the ship, and will not be within the Registry Acts; and the Courts will grant an injunction to prevent payment to the mortgagor (*k*). And though the ship and freight were included in one contract, it might have been good as to the freight, though bad as to the ship (*l*).

Assignment of future freight.

The future earnings can be assigned, and will be good against the trustee in bankruptcy, at least if the earnings are due before the bankruptcy (*m*). A general assignment of all the future earnings of a ship, which might for ever separate the ship and freight, though for security of a debt, was held to be bad in *Robinson* v. *Macdonnell* (*n*). But in *Douglas* v. *Russell* (*o*), Lord Brougham, C., held otherwise; in that case, however, the ship had been previously assigned to the same parties (*p*). An assignment of a ship, with all its future freight, earnings, and cargo, by way of security, is clearly valid (*q*); and *à fortiori* the assignment of a ship and the freight to be earned during a particular voyage (*r*).

Relative rights of respective mortgagees of ship and freight.

The right to the freight is incidental to the ownership, and can be originally dealt with only by the owner of the ship (*s*); and a mortgage of freight by the owner will bind a subsequent mortgagee of the ship who has notice of the prior charge; but where the owner of a ship assigned the freight not yet earned, and three days afterwards, with the knowledge of the assignee, mortgaged the ship to the defendants, who registered their mortgage, the assignee having neglected to give notice of his claim upon the freight to the mortgagees, it was held that the assignee was not entitled to set up any right to such freight in opposition to the rights of the mortgagees (*t*).

Notice of prior charge including freight.

Where ship-brokers made advances for a ship's use, thereby obtaining a lien on the freight, with notice of a mortgage of the

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(*k*) *Mestaer* v. *Gillespie*, 11 Ves. 637; *Gardner* v. *Lachlan*, 4 My. & Cr. 129.

(*l*) *Mestaer* v. *Gillespie*, *sup.*; *Davenport* v. *Whitmore*, 2 My. & Cr. 177.

(*m*) *Leslie* v. *Guthrie*, 1 Bing. N. C. 697; *Gardner* v. *Cazenove*, 26 L. J. Ex. 17; *Belcher* v. *Capper*, 4 Man. & Gr. 502. See also *Tailby* v. *Official Receiver*, 13 App. Ca. 523, 543.

(*n*) 5 M. & S. 228; *Speldt* v. *Lechmere*, 13 Ves. 588.

(*o*) 3 My. & K. 488. But see *Re Ship Warre*, 8 Pri. 269, n.

(*p*) See *Douglas* v. *Russell*, 4 Sim. 535, where the facts are stated.

(*q*) *Curtis* v. *Auber*, 1 J. & W. 526; *Gibson* v. *Ingo*, 6 Ha. 112; *Lindsay* v. *Gibbs*, 22 Beav. 522.

(*r*) *Langton* v. *Horton*, 1 Ha. 549.

(*s*) *Morrison* v. *Parsons*, 2 Taunt. 407; *Lindsay* v. *Gibbs*, *sup.*; *Willis* v. *Palmer*, 6 Jur. N. S. 732.

(*t*) *Wilson* v. *Wilson*, L. R. 14 Eq. 32; *Rusden* v. *Pope*, L. R. 3 Ex. 272. See *Essarts* v. *Whinney*, 88 L. T. 191.

ship by an indorsement on the certificate of registry, and such mortgage was, in fact, a mortgage not only of the ship, but also of the freight, it was held that their lien must be postponed to the claim of the mortgagee to the freight, though he did not take possession of the ship till the completion of the voyage (*u*).

Priorities as between mortgagee of ship and of freight.

The first registered mortgagee of a ship by taking possession obtains a legal right to receive all freight not completely earned, in priority to a mortgagee of freight, of which he has no notice at the time (*x*); and he may tack to the amount due on his mortgage the amount of any subsequent charge which he may have acquired on the freight in priority to any mesne charge on the freight specifically of which he had no notice; and it makes no difference that the mesne incumbrancer was the first to give to the charterer notice of his charge on the freight (*y*). But a mortgagee of freight will not be postponed to a subsequent second mortgagee of the ship, inasmuch as the interests of both are equitable, and must generally rank in priority of date (*z*).

Notice to be given to mortgagee of ship.

A mortgagee of freight, as he cannot complete his title by taking possession, should give notice of his charge to the registered mortgagee of the ship, and any other incumbrancer of whom he has notice, as well as to the charterer by whom the freight is payable (*a*).

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Section III.

Mortgages of Cargo.

Mortgagee of ship not entitled to cargo.

A mortgage of a ship, either *simpliciter* or "with the appurtenances," will not pass to the mortgagee the cargo, unless expressly included in the security (*b*). Even in the case of a whaling ship, when the cargo constitutes the whole earnings of

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(*u*) *Gibson* v. *Ingo*, 6 Ha. 112.

(*x*) *Brown* v. *Tanner*, L. R. 3 Ch. 597. See *Heather Bell*, (1901) P. 272, C. A.

(*y*) *Liverpool Marine Credit Co.* v. *Wilson*, L. R. 7 Ch. 507.

(*z*) *Liverpool Marine Credit Co.* v. *Wilson*, L. R. 7 Ch. at p. 511.

(*a*) See 2 Mar. L. C. 458.

(*b*) *Alexander* v. *Simms*, 5 De G. M. & G. 57.

the ship, an assignment of the ship "with its appurtenances" will not pass to the mortgagee, as of the nature of freight incident to the employment of the ship, the cargo of oil gained during the adventure (*c*).

Mortgage of cargo does not require registration.

In the absence of any special agreement to the contrary, the cargo belongs to the mortgagor, who may assign it independently of the ship, and such assignment will not require registration either under the Merchant Shipping Act (*d*), or under the Bills of Sale Act (*e*).

Mortgage of future cargo.

An assignment by way of mortgage of a ship and future cargo may be made, which will be valid, and such title will not be affected by a subsequent execution by a judgment creditor, at all events if due diligence is used to complete the title by notice (*f*).

Master's power over cargo.

The master is intrusted with the cargo for the sole purpose of taking reasonable care of it and conveying it to its destination, and is bound to make every possible exertion to accomplish that purpose (*g*). A duty is cast on him, in many cases of accident and emergency, to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed, and, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing (*h*). He has no power to sell or mortgage the cargo or any part thereof except under the pressure of severe consummate distress (*i*) either of the ship, as when the master has no other means of procuring supplies or repairs, or of the cargo, as where it lies perishing at some intermediate port. It is not sufficient to prove that the master was doing the best for all concerned (*k*). Though the ship is a wreck, and the cargo on the wreck, still he has no power to sell the cargo if he can store it (*l*).

Notice to master.

A mortgagee of cargo should, immediately upon the execution of the mortgage, give notice thereof to the master of the ship. Where mortgagees of cargo did not send notice of their mort-

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(*c*) *Langton* v. *Horton*, 5 Beav. 9.

(*d*) *Ibid.*

(*e*) 41 & 42 Vict. c. 31, s. 4.

(*f*) *Langton* v. *Horton*, 1 Ha. 549. See *Bryans* v. *Nix*, 4 M. & W. 775.

(*g*) *Notara* v. *Henderson*, L. R. 7 Q. B. 225.

(*h*) *Tronson* v. *Dent*, 8 Moo. P. C. 419; *Notara* v. *Henderson*, *sup.*; *Australasian Navigation Co.* v. *Morse*, L. R. 4 P. C. 222; *Cargo ex Argos*, L. R. 5 P. C. 165.

(*i*) *Gratitudine*, 3 C. Rob. Adm. 240.

(*k*) *Tronson* v. *Dent*, 8 Moo. P. C. 419; *Acatos* v. *Burns*, 3 Ex. D. 282; *Atlantic, &c. Co.* v. *Huth*, 16 Ch. D. 481, C. A.

(*l*) *Notara* v. *Henderson*, L. R. 7 Q. B. 227; *Acatos* v. *Burns*, 3 Ex. D. 290; *Atlantic, &c. Co.* v. *Huth*, 16 Ch. D. 481, C. A.

gage till two months after the date of the deed, so that such notice was not received by the master till after the mortgagor had become bankrupt, and it appeared that there were means of earlier communication, it was held that the cargo was in the reputed ownership of the mortgagor at the commencement of the bankruptcy (*m*).

Bottomry bonds and respondentia.

Hypothecations of cargo, otherwise than by way of mortgage, will be considered in a subsequent chapter (*n*).

(*m*) *Exp. Lucas*, *Re Gwire*, 3 De G. & J. 113. See *Acraman* v. *Bates*, 6 Jur. N. S. 294. See further, as to reputed ownership, *ante*, pp. 185 *et seq.*

(*n*) *Post*, Chap. LXIV. Sect. II.

CHAPTER XVI.

OF MORTGAGES OF STOCK AND SHARES.

SECTION I.

MORTGAGES OF STOCK.

Stocks are perpetual annuities.

PUBLIC stocks or funds are, in fact, *perpetual annuities* granted for ever, redeemable by the public; they are a mere right, and the circumstance that Government is the debtor makes no difference; and they constitute a mere demand of dividends as they become due, having no resemblance to a chattel moveable or coin-money capable of possession and manual apprehension (*a*).

There is a very untechnical expression used with regard to stock; there is literally no such thing as one hundred pounds stock: knowing, however, that in common parlance people, speaking of stock, will so express themselves, the Court will apply it (*b*).

How stock is transferred.

Stock in the public funds is transferable by the stockholder in person, or under the authority of a letter of attorney, according to the form prescribed by the Bank of England.

Power of sale.

Express powers were not formerly necessary in mortgages of stock, or in the instruments of defeasance executed by the transferee; nor need a mortgagee of stock now rely on his statutory power in order to realise his security by sale (*c*).

If stock or shares are made the security for money, and the day appointed for payment is past, the mortgagee may at once proceed to sell the stock, and repay himself principal and interest, without any authority from the mortgagor, and without commencing an action of foreclosure (*d*). Where no time for payment has been fixed, then the mortgagee cannot sell until

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(*a*) *Wildman* v. *Wildman*, 9 Ves. 174.

(*b*) *Kirby* v. *Potter*, 4 Ves. 748, 751.

(*c*) Approved, (1901) 1 Ch. p. 73, per Farwell, J.

(*d*) (1901) 1 Ch. at p. 73; *Tucker* v. *Wilson*, 1 P. Wms. 261; *Lockwood* v. *Ewer*, 2 Atk. 303.

he has given to the mortgagor reasonable notice demanding payment, and such notice should fix a day for that purpose (*e*). But the mortgagee will be decreed to account for the surplus (*f*). He may, however, foreclose if he prefer it, and that, too, although an express power of sale is given him by the mortgage deed, and whether his interest be legal or equitable (*g*); and the mortgagee of a reversionary interest in stock may have foreclosure if he desire that remedy (*h*).

Misdescription.

Where a person mortgaged his reversionary interest in 3,681*l.* stock standing in the name of executors but the amount so standing was 4,531*l.*, it was held that the security was limited to 3,681*l.* (*i*).

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Section II.

Mortgage of Shares in a Company.

Mortgagee whether liable for unpaid calls.

i.—Introductory Remarks.—Where, by the rules of a company, shares are not to be transferred until all arrears of calls are paid, it would seem that a mortgagee by transfer cannot be recognized as transferee until payment of all arrears; but if the company recognize him as such, they cannot call upon him to pay the arrears (*k*).

When mortgagee is liable as a contributory.

Where shares in a company are transferred as security for a debt, the transferee is in the position of legal owner of the shares, and becomes liable as a member to be placed on the list of contributories on the winding-up of the company (*l*). But an equitable mortgagee, in whose name the shares have not been registered, is not a contributory, nor will the register be rectified by the insertion of his name (*m*); but if shares which have been deposited with creditors are exchanged by

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(*e*) *Deverges* v. *Sandeman, Clark & Co.*, (1902) 1 Ch. 579, C. A.

(*f*) *Harrison* v. *Hart*, Comyns, 393; *Langton* v. *Waite*, L. R. 4 Ch. 402.

(*g*) *Slade* v. *Rigg*, 3 Ha. 35.

(*h*) *Slade* v. *Rigg*, *sup.*; *Wayne* v. *Hanham*, 9 Ha. 62; *Stamford, &c. Banking Co.* v. *Ball*, 4 De G. F. & J. 310.

(*i*) *Woodburn* v. *Grant*, 22 Beav. 483.

(*k*) *Watson* v. *Eales*, 23 Beav. 294.

(*l*) *Re Land Credit Co. of Ireland*, L. R. 8 Ch. 831. See *Re Asiatic Banking Corporation*, L. R. 4 Ch. 252; *Re Patent Paper Manufacturing Co.*, L. R. 5 Ch. 294.

(*m*) *Newry Rail. Co.* v. *Moss*, 14 Beav. 64; *Re Joint Stock Discount Co.*, L. R. 3 Ch. 119.

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them for shares in their own names, they are liable as contributories, though known to the company as holding the shares as security only (*n*).

A power to forfeit shares and to refuse to transfer shares unless debts due from the shareholder to the company are paid does not constitute a charge on the shares (*o*).

Where the holder cannot transfer shares until debts due to the company are paid, any debt will prevent the transfer, although it has nothing to do with the shares (*p*).

Power of sale.

A mortgagee of shares has an implied power of sale after the time fixed for payment, or within a reasonable time if no date is fixed (*q*); and a depositee of share certificates by way of security is entitled to foreclosure (*r*).

A person taking a deposit of a certificate of shares and a blank transfer by way of security is in the position of an equitable mortgagee and not of a pledgee, and can sell the shares after reasonable notice requiring payment, even if he overstates the amount due to him, and he can sell the whole block of shares deposited and not merely sufficient to cover the liability (*s*).

It seems also that he is not bound to watch the market so as to sell at the highest price (*t*).

ii.—How Mortgages of Shares are effected.—Mortgages of fully paid-up shares in joint stock companies are usually effected by a transfer of the shares to the mortgagee duly registered, accompanied by a deed of defeasance. If, however, the shares are not fully paid up it will generally be more prudent for the mortgagee not to take a complete registered transfer to himself, and so incur the liabilities of a shareholder (*u*). In such a case the mortgagee should require the certificates to be delivered to him, and also take a transfer to himself executed only by the mortgagor, which the mortgagee can at any time render complete by executing it himself and registering it.

Deposit of certificates.

A valid security may be made by a deposit of the certificates

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(*n*) *Price and Brown's Case*, 3 De G. & S. 147.

(*o*) *Re Dunlop*, 21 Ch. D. 583, C. A.

(*p*) *Ex p. Stringer*, 9 Q. B. D. 436, C. A.

(*q*) *Supra*, p. 292.

(*r*) *Harrold* v. *Plenty*, (1901) 2 Ch. 314.

(*s*) *Stubbs* v. *Slater*, (1910) 1 Ch. 632.

(*t*) *Re McMurdo*, (1902) 2 Ch. 684.

(*u*) *Newry Rail. Co.* v. *Moss*, 14 Beav. 64; *Re Land Credit Co. of Ireland*, L. R. 8 Ch. 831.

of shares; and such security will operate as a mortgage by deposit of documents of title and not as a pledge of the shares (*x*).

Form of transfer of shares.

A transfer of shares must be in the form prescribed by the statute or by the regulations of the company; and the company may refuse to register transfers not according to the prescribed form (*y*). Unless required by the regulations, a transfer of shares in a company governed by the Companies Act, 1908, need not be under seal (*z*). By the Companies Clauses Consolidation Act, 1845, transfers of shares and stock of companies incorporated for carrying on undertakings of a public nature are required to be by deed (*a*).

Transfer by delivery.

The Companies Act, 1908 (*b*), empowers companies to issue, with respect to fully paid-up shares and stock, share warrants to bearer transferable by delivery, the effect of which warrants is to entitle the bearer to the shares or stock specified therein, and the shares or stock may be transferred by delivery of the warrants. Except under the provisions of this Act, there appears to be no power to issue shares transferable by delivery (*c*).

Transfers in blank.

If the shares are not fully paid up, and consequently the transfer is not registered, it has been a frequent practice for the mortgagee to take either a transfer in blank, or a mere deposit of the shares, together with a power of attorney to execute a transfer in the name of the mortgagor; the mortgagee's name would thus not appear on the register, and he would be enabled to transfer the shares directly to a purchaser. This practice is very commonly adopted and is found convenient, for the mortgagor remains the registered holder of the shares until the mortgagee exercises the power of sale. The method is, however, open to the following objections:—

1. If the mortgagor fraudulently transfers the shares behind the back of the mortgagee and the purchaser takes

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(*x*) *Exp. Moss*, 3 De G. & S. 599; *Exp. Stewart, Re Shelley*, 4 De G. J. & S. 543; *Binney* v. *Ince Hall Coal Co.*, 35 L. J. Ch. 363; *Re Tahiti Cotton Co., Exp. Sargent*, L. R. 17 Eq. 273; *Colonial Bank* v. *Whinney*, 11 App. Ca. 426. See *inf.*, p. 298.

(*y*) *Re General Cemetery Co.*, 6 E. & B. 415.

(*z*) *Re Tahiti Cotton Co., Exp. Sargent*, L. R. 17 Eq. 273. See also sects. 14, 15 of the Companies Clauses Act, 1845, as to the transfer of shares in companies governed by the Act.

(*a*) 8 & 9 Vict. c. 16, s. 14.

(*b*) 8 Edw. 7, c. 69, s. 37.

(*c*) See *Re General Co. for Promotion of Land Credit*, L. R. 5 Ch. 363, affd. *sub nom. Princess of Reuss* v. *Bos*, L. R. 5 H. L. 176; *McEwen* v. *West London Wharves Co.*, L. R. 6 Ch. 655.

without notice of the mortgage, he will get a good title. But this can be prevented by getting a restraining order under 5 Vict. c. 5, s. 4, or by giving a notice in lieu of distringas, and in either case the company would have to give the mortgagee notice before registering the transfer.

2. Before the transfer is registered someone else may come forward and claim the shares under a prior title.
3. The articles may contain a clause as to lien, and the mortgagee may find that he cannot sell the shares without discharging the lien.
4. If the shares are not fully paid there may be a forfeiture on non-payment of calls.
5. The articles may give the directors so large a discretion to refuse registration of transfers that it may be difficult to find a purchaser of whom they would approve (*d*).

Lastly, the articles may require transfers to be by deed, in which case a transfer in blank is void at law and as a deed inoperative, but in equity as an agreement it will give a right, subject to any superior equity, to call for a legal transfer (*e*).

Notice.

A good equitable security may thus be given whether the regulations of the company do(*f*) or do not(*g*) require transfers to be by deed, and notice to the company is not necessary to complete the mortgagee's title and preserve priority over subsequent equitable titles. Section 27 of the Act of 1908 precludes the company from receiving notice for this purpose (*f*). But where the company is itself an incumbrancer notice must be given to the company so as to protect the mortgagee from any lien claimed by the company on the shares (*h*).

Sub-mortgage.

If the holder of a blank transfer as mortgagee hands the blank transfer to a third person to secure his own debt such third person can only take such limited interest as his assignor had and cannot rely on the doctrine of purchaser for value

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(*d*) 20 Q. B. D. 576.

(*e*) *Powell* v. *London and Provincial Bank*, (1893) 3 Ch. 555.

(*f*) *Société Générale* v. *Walker*, 11 A. C. 20; *Colonial Bank* v. *Whinney*, 11 A. C. 426.

(*g*) *France* v. *Clark*, 22 Ch. D. 830; 26 Ch. D. 257.

(*h*) *Bradford Banking Co.* v. *Briggs*, 12 A. C. 29; and see *post*, Chap. LVI., Sect. I. (v).

without notice, for the fact that the transfer is in blank affects him with notice (*i*).

But if the mortgagee, acting beyond his authority, fills in the name of a transferee and the transfer is registered, the transferee can hold his shares if he be a purchaser for value without notice, but not if he knows the mortgagee has only a limited authority (*j*).

The mortgagee, though entitled to fill in the transfer, is not entitled to mortgage the shares themselves and to authorise their registration in the name of the new mortgagee as security for his own debt (*k*).

Risks of blank transfers.

As already stated, the taking of transfers in blank is attended with serious risks to all parties concerned. The transfers may come, by being stolen or otherwise, into the hands of a stranger, who may fill in the blanks in his own name, and sign the transfers, and dispose of them to a *bonâ fide* purchaser without notice; in which case either the mortgagee or the company must bear the loss, according to the circumstances of the particular case.

On the other hand, the mortgagor runs the risk of improper dealing with the transfer by the mortgagee. A person who has signed a negotiable instrument in blank, or with blank spaces, is estopped from disputing any alteration made in the document after it has left his hands, by filling up blanks or otherwise, in a way not *ex facie* fraudulent, as against a *bonâ fide* holder without notice (*l*), unless the circumstances of the case are such as to put such holder on inquiry at the time he took the transfer (*m*). These principles appear to apply not only to negotiable instruments, but to all cases where the person taking property can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so (*n*).

Order and disposition.

Shares mortgaged by a transfer in blank are not in the order and disposition of the registered holder (*o*).

(*i*) *France* v. *Clark*, *sup.*; *Fox* v. *Martin*, 64 L. J. Ch. 473.

(*j*) *Sheffield* v. *London Joint Stock Bank*, 13 A. C. 333, as explained, (1892) A. C. 208.

(*k*) See note (*g*), p. 296.

(*l*) *France* v. *Clark*, 26 Ch. D. 257, at p. 262. See *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201, at p. 215; *Fox* v. *Martin*, 64 L. J. Ch. 473.

(*m*) *Earl of Sheffield* v. *London & Joint Stock Bank*, 13 App. Ca. 333; *Colonial Bank* v. *Cady and Williams*, 15 App. Ca. 267.

(*n*) *Colonial Bank* v. *Whinney*, 15 App. Ca. at p. 285; *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201.

(*o*) *Colonial Bank* v. *Whinney*, 11 A. C. 426.

Hindering transfer.

A transferor of shares is under an implied obligation not to hinder the transferee from obtaining registration, and this applies where the transfer is in blank and is subsequently filled in by a *bonâ fide* holder for value (*p*).

Deposit of certificate without transfer.

As we have already seen (*q*), the deposit of a certificate of shares, accompanied by a blank transfer, is an equitable mortgage, and so, it seems, is a deposit without a transfer. It is true that a marketable or negotiable instrument may be the subject of pledge, and, accordingly, it was held that a deposit of railway bearer bonds did not confer on the holder a right to foreclosure (*r*). And the same principle would seem to apply to a deposit of instruments which are not, strictly speaking, marketable or negotiable, as debentures or share warrants to bearer (*s*). But a share is a chose in action, and where there is a simple deposit of certificates of shares unaccompanied by any transfer, the deposit will operate as an equitable mortgage like a deposit of title deeds of land, and be deemed to give a right to a legal transfer of the shares, carrying with it the remedies incident to a mortgage, including the right to foreclosure (*t*).

So where a deposit of shares was made with bankers as a security for an advance, but no written memorandum was made, the borrower having become bankrupt, it was held that the proper remedy of the bankers was to apply to the Court to have the shares realized, as in the case of a deposit with a written memorandum, and they were accordingly allowed the costs of such application (*u*).

Again, where directors of a company deposited their shares with a bank to secure an advance to the company, and one of the directors became bankrupt, the transaction was treated as one of equitable mortgage, and accordingly decided in favour of the bank as against the bankrupt's assignees, on the ground that the company had constructive notice of the deposit (*x*).

Where shares were deposited without any written document and the mortgagor could not be found, the Court ordered advertisements that the shares would be sold if the mortgagor did

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(*p*) *Hooper* v. *Herts*, (1906) 1 Ch. 549.

(*q*) *Ante*, p. 294.

(*r*) *Carter* v. *Wake*, 4 Ch. D. 605. As to what are marketable securities, see *Stern* v. *Reg.*, (1896) 1 Q. B. 211, and cases there cited.

(*s*) As to the negotiability of bearer debentures, see (1898) 2 Q. B. 658.

(*t*) *Harrold* v. *Plenty*, (1901) 2 Ch. 314.

(*u*) *Exp. Moss*, 3 De G. & S. 599.

(*x*) *Exp. Stewart*, *Re Shelley*, 4 De G. J. & S. 543.

not redeem within one month and directed a sale after the expiration of the month without any claim by the mortgagor (*y*).

In one case, where share certificates were deposited with a bank as security, accompanied with a blank transfer, which was inoperative as a transfer, the transaction was, throughout the judgments, referred to as a pledge ; but it seems that the term was not used in a strictly technical sense, and that, if any necessity had arisen for taking into account the distinction between a pledge and a mortgage, the transaction would have been treated as one of equitable mortgage by deposit (*z*).

(*y*) *Re Harrison and Ingram, Exp. Whinney*, (1905) W. N. 143.

(*z*) *Colonial Bank* v. *Whinney*, 11 App. Ca. 426.

CHAPTER XVII.

MORTGAGES OF POLICIES OF LIFE ASSURANCE.

Mortgages of policies coupled with life interests in realty or personalty.

i.—Introductory Remarks.—Mortgages of policies of life assurance are generally given as collateral securities, and, as such, are of great value when coupled with a life interest in real or personal property, so as to provide a fund for payment of interest and premiums. But, unless accompanied by a security upon property yielding an immediate income adequate to such payments, a mortgage of a policy is obviously a precarious and ineligible security, inasmuch as it requires periodical payments for its maintenance which must be made by the mortgagee if the mortgagor fails to do so; also, it yields no income, and in the first instance it is of little value for purposes of sale, though its value increases in proportion as it has been long effected, especially if, by the terms of the policy, the insured becomes in course of time entitled to accretions of bonus, or reduction of premiums.

Company not chargeable with interest on policy moneys.

A further disadvantage attending mortgages of policies is that, upon the death of the assured, the assurance company may be justified in refusing to pay over the policy moneys to the mortgagee till satisfied on points which may arise; in which case the company is not chargeable with interest on the policy moneys, unless they have been guilty of default or undue delay.

Where a policy of life assurance was deposited by way of equitable mortgage, and, on the death of the assured, the mortgagee did not take out administration, but an order was made dispensing with the legal personal representative of the assured, and directing payment of the policy moneys, which were insufficient to satisfy the amount due under the mortgage, to the mortgagee, it was held that interest on the policy moneys did not begin to run until the order for payment was made (*a*).

(*a*) *Webster* v. *British Empire Mutual Life Assurance Co.*, 15 Ch. D. 169, C. A.

Court cannot compel insurance.

Where a mortgage is effected by a tenant for life, or on an estate depending upon lives, it is usual to insure the lives of the *cestuis que vie* as a further security; but in the absence of any such stipulation the Court cannot compel the mortgagor to insure the lives (*b*).

Insurance of lives on which leases depend.

Where a mortgagee of leaseholds for lives insures one of the lives, the insurance moneys will not be applied in part redemption, but may be held as compensation for the loss to his security by the dropping of the life (*c*).

Mortgages of policies alone.

Policies are, however, often mortgaged by themselves. A policy is a security which can be given by those who have no other to give, by men in business, who can afford to pay interest and premiums for the use of capital, or by persons who, like beneficed clergymen and officers on half-pay, are in receipt of an assured income during their lives, which they cannot legally pledge to an incumbrancer. When policies are mortgaged alone, the concurrence of sureties in the transaction is often required for the purpose of guaranteeing the payment of the interest and premiums, and, sometimes, of the principal.

Securities of this kind are affected by the death of the assured by the hands of justice (*d*), or by suicide when sane (*e*).

Policy invalidated by suicide of the assured.

Where the policy is to be void if the assured "died by his own hands," all acts of voluntary self-destruction are included, and the clause is not limited to acts of felonious suicide (*f*).

Stipulations in favour of *bonâ fide* assignee.

A policy may contain a stipulation that it shall be valid to the extent of the interest of any *bonâ fide* assignee, notwithstanding that the assured should commit suicide (*g*). And where a policy containing a stipulation to this effect was mortgaged with other property for a sum exceeding the amount of the policy, and the assured committed suicide (during a fit of temporary insanity), it was held that the payment of the sum assured to the mortgagee did not give the insurance company

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(*b*) *Grantley* v. *Garthwaite*, 6 Madd. 96.

(*c*) *Milliken* v. *Kidd*, 4 Dr. & War. 274.

(*d*) *Amicable Soc.* v. *Bolland*, 4 Bli. N. S. 194.

(*e*) *Moore* v. *Woolsey*, 4 E. & B. 254. But it would seem that suicide by an insane person would, in the absence of express stipulation to the contrary, invalidate a policy on his life. See *Horne* v. *Anglo-Australian, &c. Co.*, 7 Jur. N. S. 673; *Borrodaile* v. *Hunter*, 5 Man. & Gr. 639; *Clift* v. *Schwabe*, 3 C. B. 437, 481, n.; *Dufaur* v. *Professional Life Ass. Co.*, 25 Beav. 599.

(*f*) *Borrodaile* v. *Hunter*, 5 Man. & Gr. 639; *Clift* v. *Schwabe*, 3 C. B. 437, 481, n.

(*g*) *Moore* v. *Woolsey*, 4 E. & B. 254; *Cook* v. *Black*, 1 Ha. 390; *Dufaur* v. *Professional Life Ass. Co.*, *sup.*; *Jones* v. *Consolidated Investment Co.*, 26 Beav. 256.

any equity against either the property comprised in the mortgage or the estate of the assured, neither the doctrine of marshalling nor that of principal and surety being applicable to such a case (*h*).

Who is an assignee.

A deposit and agreement to assign, or a mere letter charging the policy with a floating balance, is a sufficient assignment within this clause; and notice need not be given to the office (*i*).

Protection of interests of third party.

Where the terms of the condition were, that a third party should, notwithstanding that the assured might commit suicide, be indemnified out of the sum assured to the extent of his interest, an inquiry was directed whether he had any securities for his debt other than the policy in order to ascertain such interest (*k*).

A stipulation to take effect in case of the suicide of the assured, "if any third party have acquired a *bonâ fide* interest by assignment or by legal or equitable lien for a valuable consideration, or as security for money," does not apply in favour of the trustee in bankruptcy of the assured (*l*).

Where an insurance company advanced money on the security of a policy effected in their office, and containing such a stipulation, the company was held to be a "third party" within the meaning of the stipulation; the condition being intended for the benefit of the assured in order to render the policy an available security (*m*).

Effect of misrepresentation.

The validity of a security on a policy of assurance may be affected by misrepresentations of the assured as to health or age at the time when the policy is effected, even although the fact may be immaterial (*n*).

Mistake.

An assignment of a life policy entered into by both parties in the belief that the assured was alive, whereas he was in fact dead, was set aside (*o*).

It is of great importance, therefore, that the mortgagee of a policy of assurance should ascertain that no misrepresentation

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(*h*) *Solicitors and General Life Assurance Society* v. *Lamb*, 2 De G. J. & S. 251; *City Bank* v. *Sovereign Ass.*, W.N. (1884) 61; 32 W. R. 657.

(*i*) *Cook* v. *Black*, 1 Ha. 390; *Dufaur* v. *Professional Life Ass. Co.*, 25 Beav. 599; *Jones* v. *Consolidated Investment Co.*, 26 Beav. 256.

(*k*) *Cook* v. *Black*, 1 Ha. 390.

(*l*) *Jackson* v. *Forster*, 1 E. & E. 463.

(*m*) *White* v. *The British Empire Mutual Life Assurance Co.*, L. R. 7 Eq. 396.

(*n*) *Anderson* v. *Fitzgerald*, 4 H. L. C. 484; *Cazenove* v. *British Equitable Insurance Co.*, 29 L. J. C. P. 160; *Thomson* v. *Weems*, 9 App. Ca. 671.

(*o*) *Scott* v. *Coulson*, (1903) 2 Ch. 249, C. A.

or suppression of facts was used in effecting the policy, and also, if the policy is not in the name of the *cestui que vie*, that the assured had an insurable interest at the date of the policy.

As to interest requisite to support a policy of life assurance.

ii.—What Insurable Interest is necessary to support a Policy.—The statute 14 Geo. III. c. 48, prohibits insurances to be made by persons having no interest in the event insured; by that Act it is enacted as follows:—

No insurance to be made on lives, &c., by persons having no interest.

> Sect. 1. "That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or any other event or events (*p*) whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, as by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

No policies on lives without inserting the names of persons interested.

> Sect. 2. "That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's or persons' name interested therein, or for whose use or benefit, or on whose account, such policy is so made or underwrote."

How much may be recovered.

> Sect. 3. "That, in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events."

Extent of Act.

Sect. 4 provides that the Act shall not extend to insurances *bonâ fide* made on ships, goods, or merchandizes (*q*).

Benefit insurance societies.

It is a question whether this Act applies to benefit insurance societies formed under the Friendly Societies Acts (*r*).

Interest must be pecuniary.

The interest necessary to support a policy must be a pecuniary interest (*s*).

Insurance of person's own life.

Of course, a person effecting an assurance on his own life has an interest sufficient to give validity to the policy (*t*).

Insurance of life of husband by or

It has been held that a wife has an insurable interest in the life of her husband (*u*). And by the Married Women's Pro-

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(*p*) See, as to what transactions are within the statute, *Roebuck* v. *Homerton*, Cowp. 737; *Good* v. *Elliott*, 3 T. R. 693; *Paterson* v. *Powell*, 9 Bing. 320; *Morgan* v. *Pebrar*, 4 Sc. 230.

(*q*) See as to such policies, 28 Geo. III. c. 56.

(*r*) *Brown* v. *Freeman*, 4 De G. & S. 444.

(*s*) *Halford* v. *Kymer*, 10 B. & Cr. 724; *Hebden* v. *West*, 3 B. & S. 579; *Barnes* v. *London, Edinburgh and Glasgow Life Ass. Co.*, (1892) 1 Q. B. 864; *Harse* v. *Pearl Life Ass. Co.*, (1903) 2 K. B. 92, rev. (1904) 45.

(*t*) *Wainwright* v. *Bland*, 1 Moo. & R. 481.

(*u*) *Reid* v. *Royal Exchange Assurance Co.*, Peake's Add. Cas. 70.

for benefit of wife.

perty Act, 1882 (*x*), it is provided that a married woman may effect a policy upon her own life or the life of her husband for her separate use, and the same and all benefit thereof shall enure accordingly; and a husband may effect a policy on his own life expressed to be for the benefit of his wife, and, in the absence of fraud, the policy will create a trust for her so as not to form part of his estate or be liable for his debts.

Insurance of life of wife for benefit of husband.

A husband has an insurable interest in the life of his wife, and such interest will be presumed without proof of any pecuniary interest (*y*). There is no statutory provision enabling a husband to insure her life for his own benefit; but by the Married Women's Property Act, 1882 (*z*), she may effect a policy on her own life expressed to be for the benefit of her husband, in like manner as a husband may for the benefit of his wife.

Insurance of life of parent for benefit of child.

A parent has not an insurable interest in the life of a child (*a*); nor apparently has a child an insurable interest, within the statute of Geo. III., in the life of its parent (*b*); but by the Married Women's Property Act, 1882 (*z*), a father or mother may effect a policy on his or her own life for the benefit of a child or children.

Expectancy.

The mere expectancy of an heir or next of kin does not give an insurable interest (*c*).

Insurable interest of trustee.

An interest as trustee has been held to be sufficient to support the validity of a policy (*d*).

Insurable interest of creditor in life of debtor.

It is settled that a creditor has an insurable interest in the life of his debtor to the extent of the debt, as the prospect of his obtaining payment is considered to be diminished by the debtor's death, and the circumstance that the creditor has also a real or other security for the same debt does not affect the rule (*e*). It makes no difference that the debtor is an infant,

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(*x*) 45 & 46 Vict. c. 75, s. 11.

(*y*) *Griffiths* v. *Fleming*, (1909) 1 K. B. 805, C. A.

(*z*) 45 & 46 Vict. c. 75, s. 11.

(*a*) *Halford* v. *Kymer*, 10 B. & Cr. 724; *Henson* v. *Blackwell*, 4 Ha. 434; *Att.-Gen.* v. *Murray*, (1904) 1 K. B. 165.

(*b*) *Harse* v. *Pearl Life Ass. Co.*, (1904) 1 K. B. 558.

(*c*) *Lucena* v. *Crawford*, 2 B. & P. N. R. 324. But see *Cooke* v. *Field*, 19 L. J. Q. B. 441; Porter on Ins. (3rd ed.), p. 52.

(*d*) *Tidswell* v. *Ankerstein*, Peake, N. P. Cas. 151. See *Exp. Houghton*, 17 Ves. 253; *Exp. Andrews*, 1 Madd. 573.

(*e*) *Anderson* v. *Edie*, 2 Park, Ins. 640; *Morland* v. *Isaac*, 20 Beav. 389; *Drysdale* v. *Pigott*, 8 De G. M. & G. 546; *Bruce* v. *Garden*, L. R. 5 Ch. 32; *Salt* v. *Marquess of Northampton*, (1892) A. C. 1.

as the plea of infancy cannot be set up by third persons (*f*); but the debtor must not be an alien enemy (*g*).

No insurance must be made by way of gaming or wagering, and a policy effected to secure a debt won at play is void (*h*).

Insurable interest of surety in life of principal.

A surety has an insurable interest in the life of the principal debtor (*i*).

Extent of insurable interest.

By sect. 3 of the Act of Geo. III., the amount recoverable by the insured is made commensurate with his interest in his life. And accordingly, where a person having an insurable interest in the life of another, insured the life to the full extent of the insurable interest, and payment of that policy had been made, it was held that he could not enforce payment of another policy effected by him on the same life (*k*).

Continuing interest not necessary.

It was formerly thought that the claim of a creditor was limited not only by the extent of his interest existing at the time of his effecting the policy, but also by the extent of his interest at the time of making the claim to the policy moneys (*l*). But it is now settled that a policy of life assurance is not a contract of indemnity, but a contract for payment at a future time of a fixed sum, calculated with reference to the premiums payable, in order to purchase the postponed sum (*m*).

Whether, after discharge of mortgage, the policy belongs to the creditor or the debtor.

iii.—Whether the Policy belongs to the Mortgagee or to the Mortgagor's Estate.—Where a creditor effects in his own name an assurance on the life of his debtor, the question may arise (unless precluded by the terms of the contract) whether the policy belongs to the creditor absolutely, or is redeemable by the representatives of the debtor.

General rules where creditor insures life of debtor.

In the absence of contract, express or implied, to the contrary, a policy effected on the life of another belongs to the person who effects it (*n*).

And this rule has been held to apply where the grantee of an annuity so insured the life of the grantor (*o*).

(*f*) *Dwyer* v. *Edie*, 2 Park, Ins. 914.

(*g*) *Flindt* v. *Waters*, 15 East, 260; *Harman* v. *Kingston*, 3 Camp. 153.

(*h*) *Dwyer* v. *Edie*, 2 Park, Ins. 914.

(*i*) *Lea* v. *Hinton*, 5 De G. M. & G. 823.

(*k*) *Hebden* v. *West*, 3 B. & S. 579.

(*l*) *Goodsall* v. *Boldero*, 9 East, 71.

(*m*) *Dalby* v. *India and London Life Assurance Co.*, 18 Jur. 1024; *Robson* v. *McCreight*, 25 Beav. 272; *Burnand* v. *Rodocanachi*, 7 App. Ca. 333, at p. 340.

(*n*) *Exp. Lancaster*, 4 De G. & S. 524; *Gottlieb* v. *Cranch*, 4 De G. M. & G. 440; *Freme* v. *Brade*, 2 De G. & J. 582.

(*o*) *Knox* v. *Turner*, L. R. 5 Ch. 515; *Preston* v. *Neele*, 12 Ch. D. 760. See *Morland* v. *Isaac*, 20 Beav. 389.

Where the grantee of an annuity, at his own expense, assured the life of the grantor, and undertook, when the annuity was redeemed, to assign the policy to the grantor, it was held that, upon the death of the grantor without redeeming the annuity, the policy belonged to the grantee (*p*).

Where a loan was agreed to, one term of which was, that the debtor's life was to be insured in his own name, but the loan went off, a policy, having by mistake been effected in the name of the intended creditor, was held to belong to the debtor (*q*).

Where a person, with whom a policy of assurance is deposited by way of security, is appointed executor of the mortgagor, and he is obliged to give a receipt *as executor*, that will not render the whole sum, but only the surplus after retaining the amount of the mortgage debt, assets in his hands (*r*).

Application of the rule between mortgagee and representatives of mortgagor.

It would seem to be the result of the cases that if an insurance company pays to a creditor the full amount of the moneys assured by a policy effected on the life of the debtor, and such moneys exceed the amount of the original insurable interest, or the amount owing in respect of the debt at the time of the death, the question whether the representatives of the debtor will be entitled to the balance will depend upon whether, by the express or implied terms of the contract, the policy was effected for the creditor's protection only, and for his benefit, or as a security for the debt.

Insurance of debtor's life where no agreement to insure.

So, where a creditor, to the knowledge of, but not in pursuance of any agreement with his debtor, insured the debtor's life to an amount calculated with reference not only to the amount of the debt, but also to the premiums to become payable to keep up the policy, so as, in effect, to recoup the creditor the premiums from time to time paid by him, it was held that, no contract to insure being proved, the creditor was entitled to the full benefit of the policy as against the debtor's estate; it was further said that, even if, as alleged by the debtor's representatives, the transaction was tainted by fraud in respect of the policy, so as to give the creditor no insurable interest therein, though the office would not have been liable to pay, and might possibly be entitled to recover the money paid to the creditor, the estate of the debtor had no right thereto (*s*).

(*p*) *Bashford* v. *Cann*, 33 Beav. 109.

(*q*) *Martin* v. *West of England, &c. Co.*, 4 Jur. N. S. 158.

(*r*) *Glaholm* v. *Rowntree*, 6 A. & E. 710.

(*s*) *Freme* v. *Brade*, 2 De G. & J. 582.

Similarly, where a debtor at the request of his creditor, but not in pursuance of any agreement forming part of the mortgage contract, insured his life for an amount not exceeding the debt, and nominated the creditor as the person to receive the amount; the debt was reduced during the debtor's life, and, on his death, the creditor received the full amount: a claim by the debtor's administrator to recover the balance from the creditor was dismissed with costs (*t*).

Again, where a creditor effected in his own name a policy on the life of a debtor, and the premiums were charged to the debtor's account in the books of the creditor, but the fact was not communicated to the debtor, it was held that, there being no evidence of a contract for effecting the policy or payment of premiums, the creditor was entitled to retain the moneys received by him under the policy, and was not liable to account for them or the premiums to the debtor's representatives (*u*).

If the insurance forms part of the mortgage contract, the policy belongs to the mortgagor's estate.

But if it appears by the terms of the contract, or upon a general view of all the circumstances of the transaction, that the policy was effected for the purpose of securing an advance or debt, the policy will be redeemable by the debtor or his representatives upon payment to the creditor of what appears to be due to him for principal, interest, premiums paid by him, and costs, notwithstanding any provision to the contrary in the instrument creating the security.

Usually, in the case of a secured debt, the intention is that the premiums shall be paid by the debtor, and that the policy shall eventually belong to him, and the security is framed accordingly (*x*).

Right to policy depends on terms of contract.

The heir of entail of certain real estates in Scotland executed a bond and disposition in the Scotch form, whereby, in consideration of an advance of 10,000*l*. made to him by the trustees of an insurance society, he bound himself to pay that sum on a specified date with interest, and also to pay premiums payable on a policy of assurance which had been effected by the trustees in the society on his life against that of his father for 34,500*l*.; he thereby also assigned his reversionary interest in the real estates as security for the loan, reserving power of redemption. By a memorandum of even date with the bond, it was (among other things) agreed that the interest and premiums should be

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(*t*) *Brown* v. *Freeman*, 4 De G. & S. 444.

(*u*) *Bruce* v. *Garden*, L. R. 5 Ch. 32.

(*x*) Dav. Conv. vol. ii. pt. ii. p. 130.

allowed to accumulate at compound interest for five years certain, and that, in the event of the debtor paying the whole amount due before his father's death, the trustees should assign the policy to the debtor; but that, in the event of the debtor not having paid the whole amount due before his father's death, the policy should belong absolutely to the trustees, without prejudice to the rights of the trustees under the bond; but that, if the debtor should predecease his father without having paid all moneys due, the trustees should impute to the debt all moneys they might receive under the policy. The debtor died in his father's lifetime without having paid anything. It was held by Lord Selborne, Lord Bramwell, and Lord Morris (diss. Lord Hannen), that upon the construction of the documents the transaction amounted to a mortgage of the policy, and accordingly that, on the principle "once a mortgage always a mortgage" (y), the clause purporting to render the policy irredeemable could not be supported (z).

In the case referred to (a), Lord Selborne thus stated the law on this question:—"I am not prepared to hold that if it were made out that the policy was effected for the creditor's benefit, subject only to an option for the debtor to acquire a right to it by making a payment, which he never made, the obligation of paying the premium, which the debtor certainly undertook, would have made it the property of the debtor, contrary to the contract. I see no principle on which I ought so to hold, since the repeal of the usury laws, and in the absence of any obligation or proof of fraud, oppression, or other unfair dealing. . . . But the authorities (b) certainly establish that the *primâ facie* effect of an agreement between debtor and creditor, in a transaction such as the present, that the creditor shall effect a policy, and that the debtor shall pay the premiums, is to vest the equitable property in the policy, subject to the creditor's security, in the debtor, the principle being that what the debtor pays, or agrees to pay for, is (*primâ facie*, at all events) his, subject to the security for the purpose of which it was brought into existence."

General result of decided cases.

If, then, an insurance is effected by a creditor on the life of his debtor under a contract whereby it is agreed that the debtor shall pay the premiums (*c*), or be charged with them in account (*d*), or if an inference otherwise arises that the insurance was intended as a security (*e*), the policy or the balance of the insurance moneys will be the property of the debtor after payment of the debt, and the result is the same if the insurance be on the life of a surety, instead of on the life of the principal (*f*).

(y) See as to this rule, *ante*, p. 12.

(z) *Salt* v. *Marquess of Northampton*, (1892) A. C. 1.

(a) *Ibid.* at pp. 15, 16.

(b) *Holland* v. *Smith*, 6 Esp. 11; *Drysdale* v. *Piggott*, 8 De G. M. & G. 546; *Morland* v. *Isaac*, 20 Beav. 389; *Bruce* v. *Garden*, L. R. 5 Ch. 532.

Evidence of contract by debtor to pay premiums required.

But the Court requires distinct evidence that the creditor has agreed to effect a policy, and that the debtor has agreed to pay the premiums, and in that case the policy will be held in trust for the debtor (*g*).

Different modes of effecting policies for purpose of security.

iv.—Modes of effecting Mortgages of Policies.—Where policies are effected for the purpose of security for a loan or a subsisting debt, they may be effected either by the debtor in his own name, and assigned by him by way of mortgage, or by the creditor in his name, in which case no assignment will be necessary. The latter course has the further advantage of removing certain risks, such as avoidance of the policy by suicide of the assured. But though, if this course is adopted, an assignment is not required, a deed will be necessary for the purpose of containing covenants by the debtor for payment of the money advanced and interest thereon, and to keep up the policy. It is usual to provide expressly that on discharge of the debt, the policy shall be redeemable; but, as has been seen, if it appears by the transaction that the policy was effected by the creditor by way of security, and the debtor is made liable to pay the premiums, the policy will be redeemable without any proviso to that effect, or notwithstanding a proviso to the contrary (*h*).

Form of mortgage of policies.

A mortgage of a life policy is generally framed according to the ordinary form of a mortgage by assignment of the policy, but will contain, after a declaration of trust of the policy moneys, or, if this is omitted in reliance on the statute, after the proviso for redemption, covenants to keep up the policy and subsidiary clauses.

Bonuses.

If a policy of assurance is assigned, "together with the sum

(*c*) *Holland* v. *Smith*, 6 Esp. 11; *Re Storie's Trusts*, 1 Giff. 94.

(*d*) *Morland* v. *Isaac*, 20 Beav. 389; *Holland* v. *Smith*, *sup.*; *Drysdale* v. *Piggott*, 8 De G. M. & G. 546.

(*e*) *Williams* v. *Atkyns*, 2 J. & L. 603; and *Hawkins* v. *Woodgate*, 7 Beav. 565 (both cases of annuities); *Exp. Andrews*, 1 Madd. 573; *Lea* v. *Hinton*, 5 De G. M. & G. 823; *Courtenay* v. *Wright*, 2 Giff. 337.

(*f*) *Bell* v. *Ahearne*, 12 Ir. Eq. R. 376, 578.

(*g*) *Bruce* v. *Garden*, L. R. 5 Ch. 532.

(*h*) See *supra*.

assured," it has been held that future bonuses will pass by the assignment (*i*). But it is well to avoid all question by expressly including bonuses in the assignment (*k*).

Power of attorney to receive policy moneys.

Formerly the assignment included a power of attorney to receive the insurance money, which was held to be valid, though it could not come into operation until the death of the principal (*l*). But the insertion of such a power is now rendered unnecessary by the Policies of Assurance Act, 1867 (*m*), which enables the assignee of a policy to sue for and recover the moneys in his own name, without the concurrence or receipt of the representatives of the mortgagor.

Proviso for redemption.

A mortgage of a policy should be framed with a view to the contingency of foreclosure, for which purpose there should be the ordinary proviso for redemption (*n*).

Power to give receipts.

An express power to give receipts was once material, but is now of no moment, having regard to the extensive powers of giving receipts now conferred on mortgagees and trustees (*o*).

Declaration of trust of policy moneys.

According to the former practice in framing mortgages of policies, a declaration of trust of moneys received in respect of the policy was inserted; but this is now rendered unnecessary by the Conveyancing Act, 1881 (*p*), s. 22, which, after making the receipt of a mortgagee a sufficient discharge for moneys arising under his mortgage, provides that the money received under a mortgage (after payment of costs of recovering and receiving the same) is to be applicable in the same manner as the proceeds of sale under the statutory power given to mortgagees by sect. 19 of the same Act.

Covenants for keeping up insurance.

The mortgage should contain a covenant to keep up, and, if required, to restore the policy, and also an authority to the mortgagee to keep up and restore the policy in case of default by the mortgagor, and to add the premiums to the mortgage debt.

The covenant to keep up the insurance should be in terms negative, *i.e.*, that the mortgagor will not do any act by which the policy may be avoided, and not merely affirmative that he will do all acts requisite for keeping up the policy, otherwise

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(*i*) *Courtney* v. *Ferrers*, 1 Sim. 137; *Parkes* v. *Bott*, 9 Sim. 388.

(*k*) *Gilly* v. *Burley*, 22 Beav. 619; *Roberts* v. *Edwards*, 33 Beav. 259.

(*l*) *Pearson* v. *Amicable Assurance Office*, 27 Beav. 229.

(*m*) 30 & 31 Vict. c. 144.

(*n*) See *Slade* v. *Rigg*, 3 Ha. 35; *Wayne* v. *Henham*, 9 Ha. 62; and per Turner, L.J., in *Drysdale* v. *Piggott*, 8 De G. M. & G. 552.

(*o*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 22.

(*p*) 44 & 45 Vict. c. 41.

the avoidance of the policy by the suicide of the assured will not be a breach of the covenant (*q*). Where a policy was assigned with a covenant to do no act by which the policy might be avoided, and the covenantor avoided it by going beyond the limits of Europe without the required licence, the Court directed that the measure of damages should be the market value of the policy at the time of the breach of covenant, considering as a fact that the defendant had covenanted to pay, and would pay, the premiums (*r*).

Where the mortgagor merely covenants to keep up the policy, or in default that the mortgagee may pay the premiums and add the amount to his debt, the damages for breach of such covenant are nominal; the remedy is to add the premiums to the debt; but where the covenant is to repay the premiums, the amount paid is the measure of the damages (*s*).

Power of sale.

The statutory power of sale is usually relied upon in mortgages of policies, as in the case of other mortgages at the present time; but it is advisable to insert in the deed an express proviso that the power may be exercised by way of surrender to the office granting the policy (*t*).

Where mortgagee society is its own insurer.

Policies of assurance are often effected for securing loans made by insurance societies on life interests, and on contingent reversionary interests. The loan is usually expressed to be made by persons who are in fact the trustees of the society, but are not stated to be such, and the covenants by the mortgagor to pay principal and interest and to keep up the policy are made with the trustees. Where a policy is effected by way of security in the office of the society in which the loan is made, the usual and proper course is for the mortgagor to effect the insurance in his own name, and to assign the policy to the mortgagees by way of mortgage, for if the insurance is effected in the name of the trustees they may not be able to charge the premiums if the mortgagor should fail to pay them.

Where a policy has been mortgaged to the insurers and the mortgagor has agreed but failed to pay the premiums, they will, on taking the accounts, be treated as just allowances to the

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(*q*) *Dormay* v. *Borradaile*, 5 C. B. 380; *S. C.*, 10 Beav. 335. See Dav. Conv. vol. ii. pt. ii. 134.

(*r*) *Hawkins* v. *Coulthurst*, 12 W. R. 825. See Dav. Conv. vol. ii. pt. ii. p. 134.

(*s*) *Brown* v. *Price*, 4 Jur. N. S. 882—889; Mayne on Damages (7th ed.), 295.

(*t*) Key & Elph. (9th ed.) vol. ii. p. 42.

insurers as mortgagees, and will bear interest (*u*) provided they have kept alive the insurance, but not otherwise (*x*).

Waiver of forfeiture.

v.—Other Matters relating to Mortgages of Policies.—Of course, a company may, by the acts of its directors or agents, waive a forfeiture incurred by failure to observe the conditions of the policy (*y*).

Set-off on winding-up of insurance society.

Where a policy holder borrows money on his policy from the insurance society, which is wound up, and a value is set upon the policy, the official liquidator of the society cannot set off the debt against such value; nor, if the policy holder becomes bankrupt, can his trustee set off the value against the debt (*z*).

Proof in bankruptcy.

A covenant by the mortgagor to pay future premiums is now proveable in bankruptcy, the provisions of the Bankruptcy Act, 1883 (*a*), as to proof of future liabilities being of the most general character, so as to cover every species of contingency (*b*).

But a mortgagee who has realised his security and proved for the balance cannot prove for the value of a covenant to pay premiums (*c*).

Lien for premiums paid by bankrupt.

Where a mortgagor of a policy of assurance became bankrupt, but continued to pay the premiums, it was held that his estate had a lien on the policy moneys with interest at 4 per cent. (*d*); and the administrator of a mortgagor not bankrupt was held entitled to a similar lien (*e*); but a stranger paying the premiums has no lien, except under special circumstances (*f*).

Substituted policy.

Where, on the bankruptcy of the assured, a policy held by a creditor becomes forfeited by non-payment of the premium, a new policy subsequently taken out by the creditor for his own protection does not belong to the trustee (*g*).

(*u*) *Fitzwilliam* v. *Price*, 4 Jur. N. S. 889.

(*x*) *Grey* v. *Ellison*, 1 Giff. 438. See also *Hutchinson* v. *Wilson*, 4 Bro. C. C. 488.

(*y*) *Wing* v. *Harvey*, 5 De G. M. & G. 265; *Edge* v. *Duke*, 18 L. J. Ch. 183.

(*z*) *Exp. Price*, *Re Lankester*, L. R. 10 Ch. 648.

(*a*) 46 & 47 Vict. c. 52, s. 37.

(*b*) See *Exp. Neal*, 14 Ch. D. 579, at p. 583, C. A. See also *Exp. Waters*, *Re Hoyle*, L. R. 8 Ch. 562, at p. 568.

(*c*) *Deering* v. *Bank of Ireland*, 12 A. C. 20.

(*d*) *Shearman* v. *British Empire, &c. Co.*, L. R. 14 Eq. 4. But *qu.* see *Saunders* v. *Dunman*, 7 Ch. D. 825, 829.

(*e*) *Norris* v. *Caledonian Insurance Co.*, L. R. 8 Eq. 127, *sed qu.*

(*f*) *Re Leslie*, *Leslie* v. *French*, 23 Ch. D. 552; *Re Power's Policies*, (1899) 1 Ir. R. 6. See *Re Tyler*, (1907) 1 K. B. 865.

(*g*) *Re Gaskell*, W. N. (1881) 130.

Limitations, Statute of.

Where a policy and real estate are included in one mortgage deed, to secure one indivisible amount, and the right of the mortgagor to redeem the land has become barred, the right to redeem the policy will also be barred (*h*).

Notice of assignments of policies.

The question as to the necessity of giving notice to the office in which a policy is effected of any assignment thereof, so as to entitle the assignee to receive the policy moneys and to obtain priority over other assignees, will be considered later (*i*).

(*h*) *Charter* v. *Watson*, (1899) 1 Ch. 175.

(*i*) See *post*, Chap. LVI. Sect. I. (iv).

CHAPTER XVIII.

MORTGAGES OF PENSIONS, SALARIES, ETC.

Emoluments of judicial offices.

The sale of public offices is *malum in se*, independently of the statute law (*a*). But by a statute of Edw. VI. all assurances of any office concerning the administration or execution of justice, or any service of trust, or the receipt, control, or payment of the King's revenues or customs, or the custody of fortresses, or the clerkship in any court of record where justice is to be administered, were declared to be void, as against the person making the assurance, with an exception in favour of offices of inheritance, and of the keeping of parks or forests (*b*).

Pay of officers of the Crown.

This Act (preserving the exceptions) was afterwards extended (*c*) to Scotland and Ireland, and to all offices in the gift of the Crown, civil, naval, and military commissions and employments under the control of the different officers of state.

Naval and military pensions.

Another statute (*d*) declares to be void all assignments of and charges on, and agreements to assign or charge any deferred pay or military reward, pension, allowance, or relief payable to any officer or soldier of her Majesty's forces, or any widow, child, or other relative of any such officer or soldier, or any person in respect of any military service. And it is provided by statute, that all assignments, sales or contracts relating to naval pensions, half-pay or allowances, by officers, seamen, or marines, or their widows, or other persons entitled to an allowance from the compassionate fund or to marine half-pay, are void (*e*).

Seamen's wages.

Bills of sale, contracts, and assignments of any pay, wages, or allowances of money of any kind, due, or to grow due, to any seaman in the service of the Crown, are also void (*f*).

(*a*) *Stackpole* v. *Earle*, 2 Wils. K. B. 133.

(*b*) 5 & 6 Edw. VI. c. 16.

(*c*) 49 Geo. III. c. 126.

(*d*) 44 & 45 Vict. c. 58, s. 141, by which Act the similar provisions of the 47 Geo. III. sess. 2, c. 25, s. 2, are repealed.

(*e*) 28 & 29 Vict. c. 73, s. 4.

(*f*) *Ibid.* s. 5. See as to seamen in the Merchant Service, 57 & 58 Vict. c. 60, s. 163.

Other pensions not assignable.

The following are not assignable:—

Pensions granted for supporting the grantee in the performance of *future* services, such as the pension granted by 5 Anne, c. 4, for the more honourable support of the dignities of the Duke of Marlborough (*g*) and his posterity, payable out of the revenue of the Post Office; the salaries of the judges given for the support of the dignity of their office (*h*); the salary of a clerk of the peace (*i*); the salary of a clerk of petty sessions (*k*); and, in fact, the emoluments of any public office (*l*); annuities *pro consilio impendendo* (*m*); full pay and half-pay of an officer (*n*); a retiring pension of a military officer of the East India Company, which has been held not to pass to the assignees in bankruptcy, on the ground of being a voluntary payment (*o*).

Pensions for military service, being rendered inalienable by the recent statutes, cannot be taken in execution under 1 & 2 Vict. c. 110, ss. 14, 15, nor can a receiver of any such a pension be appointed, even though the grantee is not liable to be called into service again (*p*). The difference in this respect between half-pay and pensions, drawn in several decisions before the Acts (*q*), has ceased to be regarded. This immunity does not, however, extend to money paid in respect of commutation of retired pay (*r*). There is a power vested in a trustee in bankruptcy to reach the pay or salary of a military, naval, or civil officer, or a portion thereof, with the consent of the chief officer of the department (*s*); and half-pay, pensions, or compensation of officers, even though inalienable, may be ordered by the Court to be paid to the trustee in bankruptcy (*t*). The commission of an officer cannot be mortgaged or pledged (*u*). A voluntary allowance is not a salary or pension within the Act (*x*).

(*g*) *Davis* v. *Duke of Marlborough*, 1 Swanst. 74.

(*h*) *Ibid. arguendo.*

(*i*) *Palmer* v. *Bate*, 2 Br. & B. 673.

(*k*) *M'Creery* v. *Bennett*, (1904) 2 Ir. R. 69.

(*l*) *Hill* v. *Paul*, 8 Cl. & F. 295.

(*m*) 1 Dy. 2, a. n.

(*n*) *Barwick* v. *Reade*, 1 H. Bl. 627; *Flarty* v. *Odlum*, 3 T. R. 681; *Arbuckle* v. *Cowtan*, 3 B. & P. 328; *Lidderdale* v. *Duke of Montrose*, 4 T. R. 248; *Price* v. *Lovett*, 20 L. J. Ch. 270 (including a pension for wounds); *Lloyd* v. *Cheetham*, 3 Giff. 171; *Willcock* v. *Terrell*, 3 Ex. D. 326.

(*o*) *Gibson* v. *East India Co.*, 7 Sc. 73. See *Exp. Hawker*, L. R. 7 Ch. 214.

(*p*) *Lucas* v. *Harris*, 18 Q. B. D. 127, C. A. See *Birch* v. *Birch*, 8 P. D. 163, a case under the Indian Pensions Act, 1871.

(*q*) *Wells* v. *Foster*, 8 M. & W. 149; *Spooner* v. *Payne*, 1 De G. M. & G. 383; *Carew* v. *Cooper*, 4 Giff. 619; *Dent* v. *Dent*, L. R. 1 P. & D. 366; *Willcock* v. *Terrell*, 3 Ex. D. 323.

(*r*) *Crowe* v. *Price*, 22 Q. B. D. 429, C. A.

(*s*) B. A. 1883, s. 53, sub-s. 1.

(*t*) *Ibid.* sub-s. 2; *Re Saunders*, (1895) 2 Q. B. 424, C. A.

(*u*) *Collyer* v. *Fallon*, 1 T. & R. 459.

(*x*) *Exp. Wicks*, 17 Ch. D. 70, C. A.; *Exp. Webber*, 18 Q. B. D. 111. See *Exp. Benwell*, 14 Q. B. D. 301, C. A.; *Re Shine*, (1892) 1 Q. B. 522, C. A.

The following are assignable :—

Pensions assignable.

Compensation to a custom-house officer for the loss of office (though revocable at the pleasure of the government) (*y*); pension to commissioner of bankrupts (*z*); annuities to retired Indian civil servants (*a*); moneys payable to the representatives of an Indian judge, if he should die in and after six months' possession of office (*b*); prize money and the captors' inchoate or possible interest in it before grant by the Crown (*c*); a pension granted to a county court judge for past services (*d*); or to a judge of a Crown colony (*e*); and, generally, pensions of retired officers whether military or civil, granted solely for past services and not rendered inalienable by statute (*f*).

The profits of certain hereditary or freehold offices (most of which are now abolished) are assignable (*g*). So also the salaries of mere secretaries or clerks receivable during the pleasure of their superiors, are not "offices" within the statute of Edw. VI. (*h*).

Ecclesiastical profits and pensions.

Since the 57 Geo. III. c. 99, church livings, a canonry, or other ecclesiastical office, cannot be assigned except for certain purposes (*i*). Nor can pensions to incumbents on resignation of their benefices (*k*) be transferred either at law or in equity, or be subject to a set-off (*l*). But annuities by way of compensation to retiring incumbents under the Union of Benefices Act, 1860 (*m*), may be validly assigned (*n*).

A receiver has been appointed of the profits of a college fellowship, on the ground that no question of public policy could interfere with the validity of an assignment thereof (*o*).

A mortgage of the salary of a workhouse chaplain, which was paid out of local poor rates, was held to be valid (*p*).

(*y*) *Tunstall* v. *Boothby*, 10 Sim. 542; *Exp. Corser*, 11 Jur. 212.

(*z*) *Spooner* v. *Payne*, 1 De G. M. & G. 383.

(*a*) *Knill* v. *Dumergue*, (1911) 2 Ch. 199.

(*b*) *Arbuthnot* v. *Norton*, 5 Moo. P. C. 219.

(*c*) *Alexander* v. *Duke of Wellington*, 2 R. & My. 35.

(*d*) *Willcock* v. *Terrell*, 3 Ex. D. 323.

(*e*) *Exp. Huggins*, 21 Ch. D. 85, C. A.

(*f*) *Lucas* v. *Harris*, 18 Q. B. D. 127; *Willcock* v. *Terrell*, *sup.*; *Manning* v. *Mullins*, (1898) 2 Ir. R. 34.

(*g*) *Drummond* v. *Duke of St. Albans*, 5 Ves. 433.

(*h*) *Aston* v. *Gwinnell*, 3 Y. & J. 136.

(*i*) *Post*, p. 447.

(*k*) 34 & 35 Vict. c. 44, s. 10.

(*l*) *Gathercole* v. *Smith*, 17 Ch. D. 1, C. A.

(*m*) 23 & 24 Vict. c. 142.

(*n*) *McBean* v. *Deane*, 30 Ch. D. 520.

(*o*) *Feistel* v. *King's Coll., Cambridge*, 10 Beav. 491. But see *Berkeley* v. *King's Coll., Cambridge*, 10 Beav. 602.

(*p*) *Re Mirams*, (1891) 1 Q. B. 594.

Alimony.

Alimony has been held not to be assignable (*q*); and the same rule applies to permanent maintenance after divorce (*r*).

Allowance to committee of lunatic.

The allowance made in lunacy to a committee, though made indirectly for his benefit and without liability to account, is nevertheless an allowance made to a person in a fiduciary position for a particular purpose, and may be revoked at any time so far as not actually paid; no valid mortgage can accordingly be made of the allowance or of any arrears of it (*s*).

Customs Annuity Fund.

A mortgage by a member of the Customs Annuity and Benevolent Fund of two-thirds of his portion payable at his death, was held to be valid where the mortgagees had been admitted as nominees by the directors (*t*); but the member has only a power of appointment over the sum insured, and no right of property in it; if no nominee is admitted, the sum must go according to the rules (*u*).

(*q*) *Re Robinson*, 27 C. D. 160, C. A.

(*r*) *Watkins* v. *Watkins*, (1896) P. 222, C. A.

(*s*) *Re Weld*, 20 Ch. D. 451, C. A.

(*t*) *Re Maclean's Trusts*, L. R. 19 Eq. 275.

(*u*) *Re Philips' Insurances*, 23 Ch. D. 235, C. A.

CHAPTER XIX.

MORTGAGES OF DEBTS AND LEGACIES.

SECTION I.

MORTGAGE OF DEBTS.

Debts may be mortgaged.

i.—What Debts may be Mortgaged.—All debts, secured and unsecured, may form the subject of mortgages. Unsecured debts can rarely afford a satisfactory security; but it not unfrequently happens that a mortgage is itself transferred by way of security by the mortgagee, thus giving rise to what is called a sub-mortgage (*a*).

Future debts.

A debtor may assign future accruing payments to be made to him under an engagement with a third person (*b*). But a mortgage of the future gross receipts of a business is not good against the title of the trustee in bankruptcy by relation (*c*).

A bill of sale of all goods which should be brought upon the premises or should be in any other place in the debtor's possession, does not include the book debts (*d*).

A mortgage of all present and future personalty was held invalid as to the future property (*e*). This was founded on *Belding* v. *Read* (*f*). But the authority of these cases is much shaken by the decision of the House of Lords in *Tailby* v. *Official Receiver* (*g*), where their lordships, while declining to adjudicate upon the question, which was not before them, of a charge including all the property whatever of the person giving it, held that an assignment by way of security for a loan of all the book debts due and owing, or which might during the

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(*a*) See as to sub-mortgages, *post*, Chap. XLII. s. 4 (ii).

(*b*) *Pooley* v. *Goodwin*, 4 A. & E. 94. See *Exp. Moss*, *Re Toward*, 14 Q. B. D. 310, C. A., and *post*, p. 323.

(*c*) *Exp. Nicholls*, 22 Ch. D. 782, C. A.

(*d*) *Browne* v. *Fryer*, 46 L. T. 636, C. A.

(*e*) *Re D'Epineuil*, *Tadmore* v. *D'Epineuil*, 20 Ch. D. 758. See *Re Kelcey*, (1899) 2 Ch. 530.

(*f*) 11 Jur. N. S. 547.

(*g*) 13 App. Ca. 523.

continuance of the security become due and owing to the mortgagor, though not limited by reference to any particular business, was valid.

ii.—Precautions to be observed by Mortgagee of Debts.—In taking an assignment of a debt by way of mortgage, the following precautions should be observed :—

Inquiry as to amount due in respect of the debt.

1st. The intending mortgagee should be careful to ascertain, by previous communication with the person by whom the debt intended to be mortgaged is owing, that the sum alleged to be due is actually due ; a written admission of this fact should, if possible, be obtained ; otherwise, the mortgagee exposes himself to the danger of a question being raised between him and the debtor as to the amount actually due, as a mortgagee of a debt will take subject to all accounts between the creditor and the debtor in like manner as the transferee of a mortgage (*h*).

Protection of assignee of debt against obligation to sue.

2ndly. The mortgage deed should contain a clause providing that it shall not be obligatory on the mortgagee to sue for the debt unless and until he shall think proper.

On every assignment of a debt by way of security, it is essential that the assignee should be specially protected against the obligation which—whether by analogy to a mortgagee in possession who is bound to account for what he might have received but for his own default (*i*), or to a creditor who, by giving time to the principal debtor, discharges the surety (*k*)—would otherwise attach to him to get in the debt in due course, under penalty of being charged with the loss in case any arise through his default (*l*). A similar liability would no doubt attach to the mortgagee of any chose in action which should be lost or impaired in value by his omitting to get it in at the proper time, and should always be guarded against by a clause protecting the mortgagee against involuntary losses ; but it is obvious that there is both much more uncertainty as to the time for realising, and much more risk of loss through the omission to realise at the proper time, where a mere debt is in question, than where a title accrues to a specific fund. Hence, a mort-

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(*h*) *Matthews* v. *Walwyn*, 4 Ves. 118 ; *Chambers* v. *Goldwin*, 9 Ves. 254, at p. 264 ; *Turner* v. *Smith*, (1901) 1 Ch. 213. See *Powell* v. *Browne*, (1907) W. N. 228.

(*i*) 2 Dav. Conv. vol. ii. pt. ii. p. 139.

(*k*) See *Gurney* v. *Seppings*, 2 Ph. 40, 42.

(*l*) Dav. Conv. vol. ii. pt. ii. p. 140 ; *Exp. Mure*, 2 Cox, 63 ; *Williams* v. *Price*, 1 S. & St. 581.

gagee should be as careful to protect himself in this respect as any other fiduciary owner who acquires the right, and with it assumes the duty, of getting in a debt (*m*).

It is dangerous for a person to take even a mortgage debt as security without an indemnity clause of the nature above suggested (*n*), for though the giving of time might be a provident act and afford the best chance of recovering the debt; yet if the debt becomes irrecoverable by the wilful default or neglect of the assignee, he must bear the loss.

An indemnity clause should never be omitted when a debt is assigned by way of sub-mortgage or other security to trustees.

Power for mortgagee to compound debt.

Sometimes it may be convenient in the assignment of a debt by way of mortgage to give the mortgagee a power to compound or accept any composition or security for the payment. Such a power, however, should be given with caution, and perhaps can scarcely ever be reasonably required, unless it is likely that the mortgagor's absence beyond seas, or other special circumstances, will be likely to prevent him from concurring in such an arrangement.

Notice to debtor of assignment.

3rdly. The mortgagee should, immediately upon completion of the mortgage, give to the debtor notice of the assignment.

Independently of the provisions of the Judicature Act, 1873, the observance of this precaution will protect the mortgagee from the risk of the debtor paying the debt wholly or in part to the mortgagor, which the debtor would of course be justified in doing if he had no notice of the assignment (*o*); and also from the risk of the mortgagor mortgaging or selling the debt to some other person, not having notice of the previous assignment, who, by first giving notice to the debtor, might gain priority over the original mortgagee (*p*).

If a bond is the subject of assignment, not only should the instrument itself be given up to the assignee, so as to prevent the original obligee from dealing with the bond debt, but notice of such assignment should be given to the debtor, to prevent his

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(*m*) 2 Dav. Conv. (4th ed.) vol. ii. pt. ii. p. 140.

(*n*) *Exp. Mure*, 2 Cox, 63, at p. 76.

(*o*) *Jones* v. *Gibbon*, 9 Ves. 410. See *Norrish* v. *Marshall*, 5 Madd. 475; *Williams* v. *Sorrell*, 4 Ves. 389; *Re Lord Southampton's Estate*, *Allen* v. *Lord Southampton*, 16 Ch. D. 178, 187; *Dixon* v. *Winch*, (1900) 1 Ch. 736, C. A.

(*p*) See further as to notice as affecting priorities of incumbrances on choses in action, *post*, Chap. LVI. Sect. I. (iii).

payment of the bond debt to the obligee, which, in default of such notice, would be valid and discharge the security (*q*).

The equitable assignee of a debt is not subject to the same rules as the holder of a bill of exchange or promissory note so as to make it obligatory upon him to give notice to the assignor of non-payment by the debtor, though he would be chargeable with any loss arising from his wilful default in not getting in the debt at the proper time (*r*).

Right to sue not formerly transferable.

iii.—Power of Attorney.—Before the Judicature Act, 1873 (*s*), the right of suing at law for a debt could not, as a general rule, have been transferred. The exceptions were: negotiable securities (*t*), bail bonds (*u*), replevin bonds (*x*), railway mortgages and bonds (*y*), life policies (*z*), marine policies (*a*), bills of lading if indorsed (*b*).

Power of attorney to sue.

It has till recently been the practice to effect mortgages of legal debts (*i.e.*, of debts conferring a right of action at law) by means of an assignment with a power of attorney enabling the assignee to use the name of the assignor, so as to avail himself, for his own benefit, of the assignor's right of action. The power, being a power given for valuable consideration, may, if inserted, be expressly made irrevocable (*c*).

By the Judicature Act, 1873 (*d*), it is enacted as follows :—

Absolute assignment of debts, &c. confers right to sue.

"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor."

(*q*) *Ryall* v. *Rowles*, 1 Ves. sen. 367. See *Williams* v. *Thorp*, 2 Sim. 257; *Exp. Colvill*, Mont. 110.

(*r*) *Glyn* v. *Hood*, 1 De G. F. & J. 334.

(*s*) 36 & 37 Vict. c. 66, s. 25, sub-s. (6).

(*t*) 3 & 4 Anne, c. 9; 7 Anne, c. 25, s. 3.

(*u*) 4 Anne, c. 16, s. 20.

(*x*) 11 Geo. II. c. 19, s. 23.

(*y*) 8 & 9 Vict. c. 16, s. 47.

(*z*) 30 & 31 Vict. c. 144. See *ante*, p. 310.

(*a*) *Pellas* v. *Neptune Marine Insurance Co.*, 4 C. P. D. 139; 6 Edw. VII. c. 41.

(*b*) 18 & 19 Vict. c. 111.

(*c*) See Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 8.

(*d*) 36 & 37 Vict. c. 66, s. 25, sub-s. (6).

The Act prescribes no limit of time within which notice must be given, nor that it must be given by any particular person (*e*).

Whether a mortgage of a debt is an "absolute assignment."

It will be observed that the above enactment applies only to absolute assignments not purporting to be by way of charge only; and the question whether a mortgage of a debt is an absolute assignment within the meaning of the Act has given rise to some conflict of judicial opinion.

It is, however, now settled that a mortgage of a debt or chose in action made in the ordinary form of an assignment with a proviso for redemption (*f*), or in the form of an assignment by way of trust (*g*), of which express notice in writing is given to the debtor, is an absolute assignment within the section.

If on the construction of the document it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it is not material to consider what was the consideration for the assignment, or whether the security was for a fixed and definite sum, or for a current account. In either case the debtor can safely pay the assignee, and he is not concerned to inquire into the state of the account between the assignor and assignee. Nor does it matter that the assignee has obtained a power of attorney and a covenant for further assurance from the assignor (*h*).

But an assignment, not of the benefit of the whole contract assigned, but only of so much of a debt or chose in action as would be sufficient to provide for the repayment of the sum advanced, is a charge only, and not an absolute assignment (*i*).

Part of debt.

It seems that an assignment of part of a debt cannot be an absolute assignment, though the law seems somewhat unsettled. Mathew, L.J., thought that it could not (*k*); Darling, J., held that it could (*l*); and Bray, J., decided that it could not (*m*). There can, however, be little doubt that the latter

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(*e*) *Bateman* v. *Hunt*, (1904) 2 K. B. 530.

(*f*) *Tancred* v. *Delagoa Bay Railway*, 23 Q. B. D. 239; *Durham* v. *Robertson*, (1898) 1 Q. B. 765; *Hughes* v. *Pump House Hotel Co.*, (1902) 2 K. B. 190.

(*g*) *Comfort* v. *Betts*, (1891) 1 Q. B. 737; *Wiesener* v. *Rackow*, 76 L. T. 448.

(*h*) *Hughes* v. *Pump House Hotel Co.*, (1902) 2 K. B. 190, per Cozens-Hardy, L.J.

(*i*) *Mercantile Bank of London* v. *Evans*, (1899) 2 Q. B. 613, C. A.

(*k*) *Hughes* v. *Pump House Hotel Co.*, (1902) 2 K. B. 190, per Mathew, L.J.

(*l*) *Skipper* v. *Holloway*, (1910) 2 K. B. 630, reversed on facts.

(*m*) *Forster* v. *Baker*, (1910) 2 K. B. 636.

decision is the correct one. At all events, it is clear that there can be no valid assignment of an unascertained part (*n*).

Future debts. There is no doubt that an absolute assignment of a future debt may be a good assignment for the purposes of the section, but an assignment of an undefined portion of future debts will not come within the section (*o*). No action, however, can be brought on a future debt until it is due and ascertained (*p*).

Notice. It is no longer therefore necessary in mortgages of legal, any more than in those of equitable choses in action, to insert a power of attorney in order to enable the assignee to sue in his own name. But notice in writing to the debtor is necessary to make the assignment effectual under the Act (*q*).

To constitute a good equitable assignment of a debt, all that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person (*r*).

◆

SECTION II.

MORTGAGES OF LEGACIES.

Legacies and shares of residue are sometimes the subject of mortgage.

Future legacies. It is not clear that an assignment for valuable consideration, as by way of mortgage, of all future property, from whatever source derived, might not be inoperative (*s*). But such an assignment would be good if it only purports to include property derived from a specified source. So, where, for the purpose of securing a debt, a person executed a deed poll, reciting that he had expectations from relations and friends who might probably bequeath to him legacies or sums of money, and giving his creditor a power of attorney to sue for and receive all legacies or bequests which had already been or might thereafter be given or bequeathed to him by any person whomsoever, it was held that the deed poll created a valid equitable

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(*n*) *Jones* v. *Humphreys*, (1902) 1 K. B. 10.

(*o*) *Ibid.* per Lord Alverstone.

(*p*) *Forster* v. *Baker*, *sup.*, per Bray, J.

(*q*) Key & Elph. (7th ed.) vol. ii. p. 41.

(*r*) *Brandt* v. *Dunlop Rubber Co.*, (1905) A. C. 454.

(*s*) See *ante*, p. 318.

charge operating on future legacies so long as the debt existed (*t*).

In cases not falling within the Married Women's Property Act, 1882 (*u*), a married woman cannot dispose of a mere expectancy, either under the Fines and Recoveries Act as regards realty (*x*), or under Malins' Act (*y*) as regards personalty (*z*).

So a covenant to charge any property which the debtor may become possessed of at his sister's death, was held to be binding, notwithstanding his bankruptcy (*a*).

Where a mortgagor by deed assigned to the mortgagee certain present property, and also "all moneys of or to which he then was or might during the security become entitled, under any settlement, will, or other document, either in his own right or as the devisee, legatee, or next of kin of any person," and also all real or personal property "of, in, or to which he was, or during the security, should become beneficially seised, possessed, entitled, or interested, for any vested, contingent, or any possible estate or interest," the Court refused to give any decision as to whether the general assignment of all property was not void as being too general, but held that in any case the assignment was severable, and that the assignment operated as a valid charge of a share of residuary personalty to which the mortgagor became entitled under the will of a testator who died subsequently to the mortgage (*b*).

Pledge of legacy.

Where a specific legacy is pledged or charged by the testator the legatee is entitled to have it redeemed or exonerated by the executor (*c*).

Assent of executor to legacy.

Inasmuch as the law vests all the property of a testator in his executor for the purpose of enabling him to perform his duty of paying the testator's debts, and generally of administering his estate, the assent of the executor is necessary to entitle a legatee to take possession of his legacy, whether general or specific (*d*).

(*t*) *Bennett* v. *Cooper*, 9 Beav. 252; *Beckley* v. *Newland*, 2 P. Wms. 181; *Hobson* v. *Trevor*, 2 P. Wms. 191; *Wethered* v. *Wethered*, 2 Sim. 183; *Harwood* v. *Tooke*, 2 Sim. 192; *Hyde* v. *White*, 5 Sim. 524; *Cook* v. *Field*, 15 Q. B. 460; *Re Clarke, Coombe* v. *Carter*, 36 Ch. D. 348.

(*u*) *Post*, p. 337.

(*x*) *Post*, p. 326.

(*y*) *Post*, p. 331.

(*z*) *Allcard* v. *Walker*, (1896) 2 Ch 369.

(*a*) *Lyde* v. *Mynn*, 1 My. & K. 683.

(*b*) *Re Clarke, Coombe* v. *Carter*, 36 Ch. D. 348, C. A. See *Re Kelcey*, (1899) 2 Ch. 530; *ante*, p. 323.

(*c*) *Bothamley* v. *Sherson*, L. R. 20 Eq. 304.

(*d*) Williams on Executors (9th ed.) vol. ii. p. 1225.

It is therefore material for an intending mortgagee of a legacy to ascertain that the executor's assent thereto has been obtained.

Notice of assignment.

The mortgagee should also, immediately on completion, give notice of the assignment to the executor, or to the first person having legal dominion of the fund after it comes into existence (*e*), so as to prevent him from paying the legacy to the mortgagor, and also so as to ensure priority over any subsequent incumbrancers. This question will be more fully considered in a later chapter (*f*).

General and specific legacies.

A general legacy, though assented to, is an equitable chose in action, for which no action, either of debt or of account generally, lay at common law (*g*). But a specific legacy, after assent, vests at law in the legatee. So it was held that a legatee of leaseholds could bring ejectment for them against the executor who had assented to the bequest (*h*); and that a legatee of a specific chattel could maintain trover after assent (*i*).

Trust fund.

Trustees of a fund which is mortgaged are, if they act honestly and without notice, safe in handing over the money to the mortgagee upon his receipt, and are not concerned to inquire whether any money remains due on the mortgage. But they are not obliged to do so in all cases, and if there is any circumstance which makes it reasonable for the trustees to decline to be satisfied with the statutory receipt, they may either pay the money into Court under the Trustee Act, 1893 (*k*), or may pay to the mortgagee only what is due on his mortgage, according to the settled practice of the Court where a mortgaged fund is in Court (*l*).

(*e*) *Re Dallas*, (1904) 2 Ch. 385.

(*f*) *Post*, Chap. LVI.

(*g*) Co. Lit. 89 b; *Deeks* v. *Strutt*, 5 T. R. 690.

(*h*) *Doe* v. *Guy*, 3 East, 120.

(*i*) *Williams* v. *Lee*, 3 Atk. 223.

(*k*) *Hockey* v. *Western*, (1898) 1 Ch. 350, C. A.

(*l*) *Re Bell*, *Jeffery* v. *Sayles*, (1896) 1 Ch. 1, C. A.

Part III.

WHO MAY BE MORTGAGORS AND MORTGAGEES, AND AS TO THE SECURITY AS AFFECTED BY THE ESTATE, STATUS, AND MUTUAL RELATION OF THE PARTIES.

CHAPTER XX.

THE POWER TO MORTGAGE PROPERTY, AND HEREIN OF DISABILITIES.

SECTION I.

MORTGAGES OF PROPERTY OF MARRIED WOMEN.

Common law power of wife.

1.—Mortgages of Real Estate of Married Women.—By the common law, a wife's real estate was held by her husband in her right during the marriage, and he alone could dispose of the rents and profits. The wife could only dispose of the reversionary interest which would accrue to her if she should survive her husband, subject to his marital rights, and also to his right to curtesy; and even of this interest she could dispose only with the concurrence of her husband. A local custom for a married woman to mortgage land with the concurrence of her husband, but without any separate examination or acknowledgment, is bad, and such a mortgage is void (*a*).

Custom.

Power under 3 & 4 Will. IV. c. 74, s. 77, to mortgage realty.

A husband and wife together could, however, effectually convey the lands of the latter to a purchaser or mortgagee by means of a fine duly levied in the Court of Common Pleas. And by the Fines and Recoveries Act (*b*), s. 77, a married woman might by deed acknowledged by her, with the concurrence of her husband, dispose, by way of mortgage or other-

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(*a*) *Johnson* v. *Clark*, (1908) 1 Ch. 303.

(*b*) 3 & 4 Will. IV. c. 74.

wise, of her estate, whether legal or equitable, and whether in possession or reversion, of lands of any tenure (except copyholds in certain cases), and of money subject to be invested in the purchase of lands.

Lands devised on trust for sale.

The statutory power enabled a married woman, with her husband's concurrence, to dispose of her interest in the proceeds of lands, even though such proceeds had been properly invested by her trustees on a mortgage of land (*c*) devised or settled upon trust for sale (*d*); but she cannot pass such interest except by deed acknowledged (*e*).

Copyholds.

A declaration of trust of copyholds by a married woman by a deed acknowledged is a disposition within the section and will bind her customary heir (*f*).

Lands improperly purchased by trustees for wife.

Where trustees of a settlement which contained no power to invest in land, in breach of trust invested part of the trust funds in the purchase of a house, it was held that the married women entitled in remainder under the settlement could, by deed acknowledged with the concurrence of their husbands, join in disposing of the house so as to bind their interests therein (*g*).

Interest in mortgage debt.

The power of disposition will include a married woman's interest in a mortgage debt to which she and her husband are entitled (*h*), but not where the wife is interested in such a debt as a *cestui que trust*, the legal estate in the mortgaged lands being vested in trustees (*i*).

Concurrence of bankrupt husband.

A husband is not precluded by bankruptcy from concurring with his wife, under sect. 77 of the Act, in a disposition of her interest in real estate (*k*).

Act does not enable married woman to bind herself personally for payment of mortgage moneys.

The effect of the Act is only to enable a married woman by deed acknowledged, with her husband's concurrence, to bind her non-separate real estate, but it did not enable her to enter into a personal covenant for payment of principal or interest (*l*). This disability has, however, been removed partially as regards

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(*c*) *Miller* v. *Collins*, (1896) 1 Ch. 573, C. A.

(*d*) *Bowyer* v. *Woodman*, L. R. 3 Eq. 313; *Re Jakeman's Trusts*, 23 Ch. D. 344.

(*e*) *Frank* v. *Bollans*, L. R. 3 Ch. 717; *Miller* v. *Collins*, *sup.*

(*f*) *Carter* v. *Carter*, (1896) 1 Ch. 62.

(*g*) *Re Durrant and Stonor*, 18 Ch. D. 106, C. A.

(*h*) *Williams* v. *Cooke*, 4 Giff. 343.

(*i*) *Re Newton's Trusts*, 23 Ch. D. 181. But see *Miller* v. *Collins*, *sup.*

(*k*) *Re Jakeman's Trusts*, 23 Ch. D. 344.

(*l*) *Crofts* v. *Middleton*, 8 De G. M. & G. 192; *Pride* v. *Bubb*, L. R. 7 Ch. 64.

mortgages made since 1882, and entirely as regards mortgages made on or after the 5th of December, 1893 (*m*).

Bar of wife's equity to settlement in lands.

A disposition by a married woman, with the concurrence of her husband, under this Act bars her equity to a settlement in lands of which she is seised for an estate of inheritance (*n*).

Right of wife to redeem.

Where a husband and wife join in a mortgage of the wife's real estate, the wife is entitled to redeem on paying off the mortgage, whether the equity of redemption is expressly reserved to her or not (*o*). And this is so even where by a prior deed the wife has conveyed the property to the husband absolutely, if by extrinsic evidence it appears that she did so merely to enable him to mortgage it (*p*).

By sect. 91 of the Fines and Recoveries Act (3 & 4 Will. IV. c. 74), it is enacted that it shall be lawful for the Court in certain cases to dispense with the concurrence of the husband.

Jurisdiction of the High Court.

Applications for a dispensation should be made in the King's Bench Division (*q*); but a judge of the Chancery Division has jurisdiction, where other relief, properly obtainable in that Division, is sought in the same application (*r*).

Effect of dispensing with husband's concurrence.

Where the husband's concurrence is dispensed with, the wife is for all purposes of disposition a *feme sole*, and the deed need not be acknowledged by her (*s*).

Dispensation for purposes of mortgage.

A dispensation may be granted so as to enable a married woman to dispose of her property by way of mortgage (*t*).

Dispensation on ground of husband's lunacy.

Where a dispensation is applied for on the ground of a husband's unsoundness of mind, it must be shown that such incapacity to concur existed at the time of the application (*u*), and an affidavit of the fact should be made by a medical man (*x*).

Dispensation with consent of infant husband.

An order has been made under sect. 91 to enable a married woman to convey the legal estate in her separate property where the husband was an infant (*y*).

An order under this section does not deprive the husband

(*m*) See *post*, p. 348.

(*n*) *Life Assoc. of Scotland* v. *Siddal*, 3 De G. F. & J. 271; *Newenham* v. *Pemberton*, 17 L. J. Ch. 99.

(*o*) *Stansfield* v. *Hallam*, 5 Jur. N. S. 1334; *Gleaves* v. *Paine*, 1 De G. J. & S. 87; *Re Betton's Trusts*, L. R. 12 Eq. 553.

(*p*) *Re Marlborough, Davis* v. *Whitehead*, (1894) 2 Ch. 133.

(*q*) *Re Caine*, 10 Q. B. D. 284.

(*r*) *Exp. Thompson*, W. N. (1884) 28; *Re Giles*, W. N. (1894) 73; 70 L. T. 757.

(*s*) *Goodchild* v. *Dougal*, 3 Ch. D. 650.

(*t*) *Exp. Thompson, sup.*

(*u*) *Re Turner*, 3 C. B. 166; *Re Murphy*, 4 Man. & Gr. 635.

(*x*) *Re Reeves*, 24 W. R. 848.

(*y*) *Re Haigh*, 2 C. B. N. S. 192.

of his common law rights to the rents and profits of the land during the coverture (*z*).

Exception as to copyholds.

The proviso at the end of sect. 77 of the Fines and Recoveries Act renders the formalities prescribed by the Act unnecessary in the case of copyholds where, prior to the Act, the wife, with her husband's concurrence, could have effectually passed the lands by surrender (*a*).

As will be seen later, a wife could by deed, without either acknowledgment or her husband's concurrence, bind in equity real estate limited to her separate use (*b*).

Acknowledgment of mortgage and other deeds is abolished as to women married after the 1st January, 1883; and in the case of all women married before that date, as to all property the title to which accrues after that date (*c*).

Right of husband to wife's chattels real.

ii.—Mortgages of Chattels Real and Choses in Action.—In cases not falling within the Married Women's Property Act, 1882, a husband is possessed of his wife's chattels real in her right, and is entitled to the rents and profits thereof during the coverture, and he can dispose of such property by deed or otherwise. He can, accordingly, without her concurrence, during the coverture, mortgage or charge *inter vivos* at his pleasure the wife's chattels real, whether her interest be legal or equitable, and so as to bind her absolutely. But they are not the absolute property of the husband; he cannot dispose of them by his will; and if he dies during the coverture, having made no disposition *inter vivos*, they will revert to the wife surviving (*d*). On the death of the wife in the husband's lifetime, he will become entitled to her chattels real, whether settled to her separate use or not (*e*).

Extent of the right.

The husband's power of disposition during the coverture extends to all his wife's chattels real, whether the interest therein be in possession or in reversion, vested or contingent, and the wife surviving will be bound by such disposition, though the husband dies before the reversion falls into possession or the contingency is determined (*f*), provided the

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(*z*) *Fowke* v. *Draycott*, 29 Ch. D. 996.

(*a*) See as to the effect of this proviso, *Green* v. *Paterson*, 32 Ch. D. 95, C. A., and *Carter* v. *Carter*, (1896) 1 Ch. 62 (cases of settlements).

(*b*) *Post*, p. 332.

(*c*) *Post*, pp. 337 *et seq.*

(*d*) Co. Lit. 46 b, 351 a; Bac. Abr. tit. Baron and Feme (C) 2.

(*e*) Wms. on Exors. 9th ed., p. 605, n.

(*f*) *Purdew* v. *Jackson*, 1 Russ. 1;

interest is such as may possibly vest in the wife in possession during the coverture, but not otherwise (*g*).

Where a wife's interest in a term of years is reversionary at the time of her death, it is not necessary for her surviving husband to take out letters of administration to her in order to complete his title to the property (*h*).

Wife's equity to settlement of chattels real.

Where, however, the legal estate of chattels real is in a trustee for the wife, the mortgage, or other disposition thereof, by the husband will be subject to the equity to a settlement of the wife (*i*).

The concurrence of a wife in a mortgage by her husband of such leaseholds will not bar her equity to a settlement (*i*).

Wife's equity of redemption.

It is a consequence of the right and interest which a wife retains in her chattels real, notwithstanding coverture, that a partial disposition by the husband only operates *pro tanto* to defeat such right and interest; and, accordingly, a mortgage by a husband and wife of the wife's leaseholds was held not to bar her right to redeem during the husband's lifetime (*k*).

Voluntary conveyance of leaseholds by husband overrides mortgage by wife surviving.

So complete, however, is the effect of an absolute disposition by a husband of his wife's legal term in divesting the wife's rights, that such a disposition, even if made before the 29th of June, 1893 (*l*), though made without valuable consideration, would not be revoked, by virtue of the statute 27 Eliz. c. 4, by a subsequent mortgage made by the wife after the death of the husband, but the mortgage would confer no estate on the mortgagee (*m*).

Right of husband to wife's *choses in action.*

Much discussion formerly arose on the subject of assignments by husband and wife of *choses in action* belonging to the wife. The law was settled before Malins' Act (*n*), and in all cases not within that Act is still settled, that an assignment by the husband, or by him and his wife jointly, of *choses in action* of the latter, in possession, expectancy, or contingency, will not be binding on the wife, in case the husband die in her lifetime, and before the fund has been actually reduced into possession; and husband and wife cannot effectually dispose of a

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Hill v. *Edmonds*, 5 De G. & S. 603; *Doe* v. *Lewis*, 11 C. B. 1035.

(*g*) *Duberly* v. *Day*, 16 Beav. 33, appealed to D. P. but appeal not prosecuted, 5 H. L. C 388.

(*h*) *Re Bellamy*, 25 Ch. D. 620.

(*i*) *Hansen* v. *Keating*, 4 Ha. 1.

(*k*) *Hill* v. *Edmonds*, 5 De G. & S. 603.

(*l*) 56 & 57 Vict. c. 21.

(*m*) *Doe* d. *Richards* v. *Lewis*, 11 C. B. 1035.

(*n*) 20 & 21 Vict. c. 57.

life interest of the wife in a fund not settled to her separate use, beyond the duration of the coverture (*o*).

The wife was entitled by survivorship against the mortgagee, although the agreement for a loan was made before marriage, and although the mortgagee had obtained an order for payment out of the funds in Court between the order *nisi* and order absolute for dissolution of the marriage (*p*).

Wife's equity to settlement in *choses in action*.

A mortgage by a husband of a *chose in action* belonging to his wife was not only liable to be defeated in the event of her survivorship, but was also subject to her equity to a settlement (*q*).

Future and reversionary interest in personalty.

By the statute, commonly called "Malins' Act," power was given to married women and their husbands to deal with their future and reversionary interests in personal estate. By that statute (*r*) it is enacted that married women may by deed acknowledged dispose of reversionary interests in personal estate, and release powers over such estate, and also their right to a settlement out of such estate in possession.

Effect of disposition.

A disposition under this Act is that of the married woman, not of her husband, and accordingly the concurrence of the husband does not let in any claims against him. So, where a reversionary legacy was given to a married woman, whose husband was indebted to the testator, a deed, duly acknowledged under the Act, deprived the executors of any right of retainer of the debt (*s*).

What property passes by the disposition.

A married woman can, under this statute, dispose only of property coming to her under an "instrument," and therefore not of a reversionary interest derived under an intestacy.

Policy of assurance.

The words "any personal estate whatsoever," in sect. 1 of the Act, include a legal *chose in action*, such as a policy of life assurance effected in a married woman's own name, and are not to be confined to equitable *choses in action*, such as a legacy or other money or securities held in trust for her (*t*).

Appointments under powers, and separate property.

The observance of the formalities prescribed by this Act is by sect. 3 rendered unnecessary in the case of a disposition by a married woman in exercise of a power conferred on her by a settlement or will, or by a statute; and is manifestly unneces-

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(*o*) *Stiffe* v. *Everitt*, 1 My. & Cr. 37.

(*p*) *Prole* v. *Soady*, L. R. 3 Ch. 220.

(*q*) See *Reid* v. *Reid*, 31 Ch. D. 402, C. A. at p. 407.

(*r*) 20 & 21 Vict. c. 57, s. 1.

(*s*) *Re Batchelor, Sloper* v. *Oliver*, L. R. 16 Eq. 481. See *Re Jakeman's Trusts*, 23 Ch. D. 344.

(*t*) *Witherby* v. *Rackham*, 39 W. R. 363.

sary in the case of dispositions of property which is made the separate property of a married woman by statute (*u*).

By the Conveyancing Act, 1911, s. 7, the Court may bind the reversionary interest of a married woman arising under her marriage settlement (*v*).

Foreign domicile.

Where a married woman is domiciled abroad, the efficacy of a disposition of her interest in personal property depends on the law of her domicile (*x*).

Power of married woman to dispose of property limited to her separate use.

iii.—Trusts for separate Use of Married Women.—Independently of the statutory enactments which have been considered whereby the difficulties which the common law imposed upon dispositions by married women were in some measure removed, those difficulties were got over in two ways:—(1) By the creation of a separate estate for her independent of the control and liabilities of her husband; (2) by appointments under powers.

Nature of trusts for separate use.

Trusts for the separate use of married women were recognized in early times by the Court of Chancery (*y*), and apparently also, to some extent, by the Courts of Common Law (*z*). The effect of such trusts is not only to secure to a wife the enjoyment of the property so settled free from the control of her husband, and without being liable to his debts and engagements, but also to enable her (unless restrained from anticipation) effectually to dispose of her interest therein without any necessity for his concurrence.

What words will create a separate use.

Questions have frequently arisen as to what words are sufficient to create a trust for the separate use of a married woman. The word "separate" is the proper technical term for excluding the marital right; but it is sufficient if an intention to give property to the separate use of a married woman is clearly indicated by the instrument creating the trust (*a*).

Mode of creating a separate use.

The proper mode of creating a separate use in favour of a married woman is to vest the property in trustees upon a trust for that purpose, but if the property is not so vested, the trust

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(*u*) See 33 & 34 Vict. c. 93, and 45 & 46 Vict. c. 75.

(*v*) 1 & 2 Geo. V. c. 37.

(*x*) *Guepratte* v. *Young*, 4 De G. & S. 217; *Duncan* v. *Cannan*, 18 Beav. 128.

(*y*) Pre. Ch. 26, 44.

(*z*) *Bush* v. *Allen*, 5 Mod. 63. See *Duncan* v. *Cashin*, L. R. 10 C. P. 554.

(*a*) As to what expressions are sufficient to create a separate use, see Lewin on Trusts (12th ed.), pp. 971 *et seq.*; Godefroi on Trusts (3rd ed.), pp. 637 *et seq.*

will not be allowed to fail for want of a trustee, but the property will vest in the husband during the continuance of the coverture as trustee for the separate use of his wife (*b*).

Separate use generally attaches on any coverture.

It is now settled, that where property is limited to the separate use of a woman, whether married or unmarried, the separate use takes effect so long, and as often, as she is in the state of marriage; and therefore, during such time, she may charge and incumber it at her pleasure; and if a clause against anticipation is added, that equally operates whenever she is not sole, so as to give her the present enjoyment of an inalienable estate, independent of her husband; but in either case she has full power of disposition whilst she is single (*c*).

Where an estate for separate use or separate use with restriction against anticipation is given generally, subsequent words which appear to point to a present or future coverture only, are treated as superfluous, and the separate use applies to all covertures (*d*).

Effect of trust for separate use.

Where an estate for life (*e*) or in fee (*f*) is limited to a married woman for her separate use, she has a complete right of disposition thereof, by deed or will; and, accordingly, she can alienate that estate, independently of the Fines and Recoveries Act (*g*), without the concurrence of her husband, and without any acknowledgment. An instrument disposing of a wife's separate estate, real or personal, and executed by her, effectually conveys her equitable interest, and operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction, and the trustees are bound to convey accordingly (*h*); and when the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity (*i*). If the legal estate is vested in the wife, it can only be effectually conveyed by the wife with her husband's concurrence by deed

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(*b*) *Bennet* v. *Davis*, 2 P. Wms. 316; *Rich* v. *Cockell*, 9 Ves. 369, 375; *Ashworth* v. *Outram*, 5 Ch. D. 923, 941, C. A.; *Fox* v. *Hawks*, 13 Ch. D. 822.

(*c*) *Tullett* v. *Armstrong*, 4 My. & Cr. 377.

(*d*) *Steedman* v. *Poole*, 6 Ha. 193; *Re Gaffee*, 1 Mac. & G. 541; *Hawkes* v. *Hubback*, L. R. 11 Eq. 5; *Re Molyneux's Estate*, Ir. R. 6 Eq. 411.

(*e*) *Parkes* v. *White*, 11 Ves. 209; *Acton* v. *White*, 1 S. & St. 429; *Glyn* v. *Baxter*, 1 Y. & J. 329.

(*f*) *Taylor* v. *Meads*, 4 De G. J. & S. 597; *Atchison* v. *Le Mann*, 23 L. T. 302; *Hall* v. *Waterhouse*, 11 Jur. N. S. 361; *Blatchford* v. *Woolley*, 2 Dr. & S. 204, 206; *Pride* v. *Bubb*, L. R. 7 Ch. 64.

(*g*) 3 & 4 Will. IV. c. 74, *ante*, p. 326.

(*h*) See *Peters* v. *Lewes & East Grinstead Rail. Co.*, 18 Ch. D. 429, C. A.

(*i*) See per Lord Westbury in *Taylor* v. *Meads*, 4 De G. J. & S. 597, at p. 684.

acknowledged. The Married Women's Property Act, 1882 (*k*), does not alter the powers of a married woman over her separate estate, not being her separate property, by virtue of the Act (*l*).

A married woman may create a valid charge upon her separate property without expressly charging it in terms (*m*), but the mere fact of her being a party to a deed by which her husband alone assigns property limited to her separate use, but without any disposition by her, or any recital or covenant on her part indicating an intention to charge her interest, will not bind such interest (*n*).

Reversionary interests.

A married woman, unless restrained from anticipation, can generally dispose of a reversionary interest settled to her separate use in realty (*o*), or personalty (*p*); but it seems doubtful whether she can do so if the reversionary interest is contingent (*q*), or an interest which cannot by any possibility arise during the coverture (*r*). So, also, the trust for separate use may be so framed as not to attach to the interest of a married woman till the happening of a future event, in which case she cannot dispose of such interest until the event happen (*s*).

Savings by married women.

Savings, during coverture, from separate estate, and investments thereof in stock or furniture, are separate estate (*t*), although the stock were purchased by the husband (*u*), but not savings during discoverture (*x*). Shares in a company purchased by a wife out of savings are separate estate, and the husband is not a contributory (*y*).

Since the Judicature Act (*z*), the decisions at common law, in respect of savings, and property purchased with them, will no longer apply. The rule in equity must be followed, as it was before the Act upon an interpleader rule (*a*).

(*k*) 45 & 46 Vict. c. 75, *post*, p. 337.

(*l*) See *Re Harris' Settled Estates*, 28 Ch. D. 171.

(*m*) See *Crosby* v. *Church*, 3 Beav. 489.

(*n*) *Tullett* v. *Armstrong*, 4 My. & Cr. 377. See also *Callow* v. *Howle*, 1 De G. & S. 531.

(*o*) *Major* v. *Lansley*, 2 R. & My. 355.

(*p*) *Sturgis* v. *Corp*, 13 Ves. 190.

(*q*) *Mara* v. *Manning*, 2 J. & L. 311; *Lechmere* v. *Brotheridge*, 32 Beav. 353.

(*r*) *Bestall* v. *Bunbury*, 13 Ir. Ch. 318, 549.

(*s*) *King* v. *Lucas*, 23 Ch. D. 712, C. A.

(*t*) *Newlands* v. *Paynter*, 4 My. & Cr. 408; *Brooks* v. *Brooks*, 25 Beav. 342; *Molony* v. *Kennedy*, 10 Sim. 254, 255; *Haddon* v. *Fladgate*, 27 L. J. P. D. & A. 21; *Barrack* v. *McCulloch*, 3 K. & J. 110; *Darkin* v. *Darkin*, 17 Beav. 578; *Humphrey* v. *Richards*, 2 Jur. N. S. 432; *Haselinton* v. *Gill*, 3 T. R. 620, n.

(*u*) *Lloyd* v. *Solicitors, &c. Life Assurance*, 29 L. T. 102.

(*x*) *Spicer* v. *Spicer*, 24 Beav. 365.

(*y*) *Re Fire Insurance Corp.*, W. N. (1883) 94.

(*z*) 36 & 37 Vict. c. 66, s. 25, sub-s. 11.

(*a*) *Duncan* v. *Cashin*, L. R. 10 C. P.

Bar of estate tail.

Where an estate tail is limited to the separate use of a married woman, she may bar the entail, and dispose of the estate, free from any curtesy of her husband, but his consent is required by the Fines and Recoveries Act (*b*), under which alone she can bar the entail, and is necessary, notwithstanding that the estate is limited to her separate use; and even if there is a clause against anticipation covering the entail, she may still bar the entail, although she cannot dispose of the estate, or its income (*c*).

Effect of judicial separation, &c.

By the Matrimonial Causes Act, 1857 (*d*), in case of judicial separation or desertion, all property which the wife may acquire or which may come to or devolve upon the wife belongs to her, as a *feme sole* (*e*), although there is a clause against anticipation (*f*); and although the property, which had been vested before, had not been reduced into possession until after the desertion (*g*); and the property of which she has so become possessed as a *feme sole* becomes, on resumption of cohabitation, her separate property (*h*).

In case of desertion, and an order for protection of the earnings and property of the wife, her property, in remainder or reversion, at the date of the desertion, or decree for judicial separation, is included therein (*i*). The wife is entitled to reversionary personalty, which she and her husband had mortgaged, as soon as it falls into possession (*k*).

Under a protection order, property of which the wife is trustee is not included (*l*).

Nor does the statute apply so as to include property to which a married woman had become entitled previously to the separation or desertion (*m*).

Married woman may exercise

iv.—Appointments under Powers.—A married woman can, independently of any statutory enactments, exercise a power of

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554; *Engelback* v. *Nixon*, L. R. 10 C. P. 645.

(*b*) 3 & 4 Will. IV. c. 74. See *post*, p. 372.

(*c*) *Cooper* v. *Macdonald*, 7 Ch. D. 288, C. A.

(*d*) 20 & 21 Vict. c. 85, s. 25.

(*e*) *Bathe* v. *Bank of England*, 4 K. & J. 564; *Insole's Trust*, L. R. 1 Eq. 470; *Johnson* v. *Lander*, L. R. 7 Eq. 228, M.R.

(*f*) *Cooke* v. *Fuller*, 26 Beav. 99; *Munt* v. *Glynes*, 41 L. J. Ch. 639.

(*g*) *Re Coward and Adams' Purchase*, L. R. 20 Eq. 179; *Nicholson* v. *Drury Building Estate Co.*, 7 Ch. D. 48.

(*h*) *Re Emery's Trusts*, 32 W. R. 357.

(*i*) 21 & 22 Vict. c. 108, s. 8.

(*k*) *Re Insole*, L. R. 1 Eq. 470. See *Whittingham's Trusts*, 10 Jur. N. S. 818; *Re Coward and Adams' Purchase*, *sup.*

(*l*) *Kingsman* v. *Kingsman*, 6 Q. B. D. 122, C. A.

(*m*) *Hill* v. *Cooper*, (1893) 2 Q. B. 85, C. A. Cf. *Re Hughes*, *Brandon* v. *Hughes*, (1898) 1 Ch. 529.

power of appointment over realty by deed acknowledged.

appointment whether relating to land or simply collateral (*n*); and her husband's concurrence is not necessary (*o*), unless required by the terms of the power (*p*); and the instrument whereby the power is exercised does not require acknowledgment. This rule applies to copyholds as well as freeholds (*q*).

Copyholds.

Legal estate.

The exercise by a married woman of a power of appointment over land in favour of a mortgagee or purchaser will pass the legal estate unless outstanding (*r*).

Misrepresentation as to power.

Where a married woman joined her husband in a mortgage of an estate by deed, which represented her to have a power of appointing the fee, though, in fact, the estate was settled to her separate use for life with remainder to the husband for life with remainder over, it was held that the mortgagee was not debarred from enforcing his security against her life estate (*s*).

Payment of interest on void mortgage.

Where a mortgage is void by reason of the defective exercise of a power by a married woman, payment by her of interest for many years will not render the mortgage binding on her (*t*).

Whether release must be acknowledged.

By sect. 52 of the Conveyancing Act, 1881 (*u*), a person to whom a power, created either before or after the Act, whether coupled with an interest or not, is given, may by deed release or contract not to exercise the power. This section has been said to be merely declaratory (*x*), and though a married woman is no doubt a "person," yet it has been doubted whether she could release her power over land or reversionary personalty except with her husband's concurrence and by deed acknowledged (*y*); but it has since been decided that she can release a power of appointment over personalty by deed unacknowledged (*z*).

Sect. 6 of the Conveyancing Act, 1882 (*a*), enables a person to whom a power, created before the Act, is given, whether

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(*n*) *Lady Travel's Case*, cit. 3 Atk. 711; *Peacock* v. *Monk*, 2 Ves. Sen. 191.

(*o*) *Doe* d. *Blomfield* v. *Eyre*, 5 C. B. 713.

(*p*) *Antrim* v. *Buckingham*, 1 Ch. Ca. 17.

(*q*) *Driver* v. *Thompson*, 4 Taunt. 294.

(*r*) *Wright* v. *Lord Cadogan*, 2 Ed. 239, 252. See *Field* v. *Moore*, 7 De G. M. & G. 691, 703.

(*s*) *Wainwright* v. *Hardisty*, 2 Beav. 319.

(*t*) *Blandy* v. *Kimber*, 24 Beav. 148.

(*u*) 44 & 45 Vict. c. 41.

(*x*) Per North in *Re Radcliffe*, *Radcliffe* v. *Bewes*, (1891) 2 Ch. 662, at p. 670.

(*y*) See Wolst. Conv. and S. L. Acts (8th ed.), p. 112; Farwell, L.J., thinks differently, see Powers (2nd ed.), p. 117.

(*z*) *Re Chisholm*, *Hemphill* v. *Hemphill*, (1901) 2 Ch. 82.

(*a*) 45 & 46 Vict. c. 39.

coupled with an interest or not, by deed to disclaim such power, and the above remarks seem also to apply to this enactment (*b*).

Married Women's Property Act, 1870.

Under the Married Women's Property Act, 1870, the power of a married woman to mortgage, or otherwise dispose of, property was extended. By it certain property—for instance, earnings, deposits in savings banks, policies on her life, &c.—acquired by a woman after the Act, whenever married, was declared to be her separate property. But this Act was repealed (except as to acts done, rights acquired, or liabilities incurred) by the Married Women's Property Act, 1882.

v.—Mortgages under the Married Women's Property Act, 1882.—Since the 1st January, 1883, the Married Women's Property Act, 1882 (*c*), has introduced important changes in the law in regard to the power of a married woman to dispose of her property (*d*) by way of mortgage, or otherwise ; the effect of the Act in this respect is to introduce, instead of the old separate use in equity, a statutory separate property at law, as to which the married woman has all the powers of a *feme sole*.

By sect. 1 (1) thereof it is enacted as follows :—

Married woman to be capable of holding property as a *feme sole*.

> "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing, by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee."

This enactment is to be construed along with sects. 2 and 5 of the Act (stated below), and does not give to a married woman power to dispose of property not falling within the two latter sections ; her power of disposing of such property is still regulated by the old law (*e*).

The main object of this sub-section is "to introduce an entirely new right in married women to relieve them from the necessity of having a trustee, and to say that they shall, as provided in the subsequent part of the Act, have power to acquire,

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(*b*) See Hood & Challis (6th ed.), p. 138.

(*c*) 45 & 46 Vict. c. 75.

(*d*) "Property" in this Act includes a thing in action. See sect. 24.

(*e*) *Re Cuno, Mansfield* v. *Mansfield*, 43 Ch. D. 12, C. A. See also *Re Harris' Settled Estates*, 28 Ch. D. 171.

hold, and deal with real and personal property without the intervention of a trustee" (*f*).

Under a marriage settlement made in 1878, a widow was entitled for her life to the income of a fund, with power to appoint the property by deed or will while discovert, and in default the *corpus* was held in trust for her absolutely; she married again after the commencement of the Act; it was held that, inasmuch as, before her second marriage, she would have been entitled to have the *corpus* of the fund transferred to her absolutely, her interest therein became upon her second marriage her "separate property" by virtue of the Act, so that she was notwithstanding her marriage entitled to an absolute transfer of the fund without releasing her power (*g*).

Property of a woman married after the Act to be held by her as a *feme sole*.

Sect. 2. "Every woman who marries after the commencement of this Act, shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.

Sect. 5. "Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid."

From these enactments it is manifest that all women married after the 1st of January, 1883, have over all their property the same disposing powers, both at law and in equity, as *femes sole*. For the conveyance of real property, to which a married woman is beneficially entitled under the statute, neither the concurrence of the husband nor acknowledgment under the Fines and Recoveries Act, nor separate examination in Court, will be required (*h*). So it was held that a married woman married since 1882 might enlarge a base fee created by her before her

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(*f*) Per Cotton, L.J., *ibid.* at p. 16. See *Hope* v. *Hope*, (1892) 2 Ch. 336, 341.

(*g*) *Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 622. See *Re Davenport, Turner* v. *King*, (1895) 1 Ch. 361.

(*h*) *Riddell* v. *Errington*, 26 Ch. D. 220.

marriage without the concurrence of her husband or acknowledgment (*i*). Similarly, the protection of Malins' Act (*k*) over reversionary interests in personalty is dispensed with, and such, unless protected by settlement, may be aliened at the married woman's sole discretion without deed acknowledged or separate examination.

Women married before the 1st of January, 1883, may similarly and without restriction deal with all property their title to which accrues after that date. The title to a reversionary interest, whether vested or contingent, is deemed to "accrue" when such title was first acquired, not when it falls into possession (*l*); but a mere "*spes successionis*" is not a title to property (*m*).

It follows that the doctrine of an equity to a settlement, for the future, only applies in the case of property vested but not in possession of women married before the commencement of the Act.

Married woman trustee or mortgagee.

But the Act did not empower a woman, though married since the 1st January, 1883, who was a trustee for sale of land, to convey to a purchaser, except by deed acknowledged, and with the concurrence of her husband (*n*). This has now been altered by the Married Women's Property Act, 1907 (*o*), which enables a married woman to dispose of property held by her, solely or jointly, as trustee or personal representative as if she were a *femme* (*sic*) *sole*. But even before this Act it was not necessary, upon a sale by a married woman mortgagee, that her husband should concur in the conveyance or that the deed should be acknowledged (*p*). Nor was it necessary where a married woman who as sole surviving trustee was mortgagee and reconveyed the property (*q*).

As to stock, &c. to which a married woman is entitled.

By sect. 6, the principle of the Act is applied to all deposits in post office and other savings banks, annuities, and sums forming part of the public or other stocks and funds, and all shares, stocks, debentures, debenture stocks, or other interest of or in

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(*i*) *Re Drummond and Davie's Contract*, (1891) 1 Ch. 524.

(*k*) 20 & 21 Vict. c. 57.

(*l*) *Reid* v. *Reid*, 31 Ch. D. 402, C. A.; *Re Dixon, Dixon* v. *Smith*, 35 Ch. D. 4, C. A.

(*m*) *Re Parsons, Stockley* v. *Parsons*, 45 Ch. D. 51.

(*n*) *Re Harkness and Allsopp's Contract*, (1896) 2 Ch. 358. See sect. 18, *inf.*

(*o*) 7 Edw. VII. c. 18, s. 1.

(*p*) *Re Brooke and Fremlin*, (1898) 1 Ch. 647; *Re West and Hardy*, (1904) 1 Ch. 145.

(*q*) *Re Howgate and Osborn*, (1902) 1 Ch. 451.

any corporation or company, which, on the 1st of January, 1883, were standing in the name of a married woman so as to render such deposits, &c. presumably her separate property, unless the contrary is shown; sect. 7 has similar application to the like investments allotted or transferred to a married woman after that date. Sect. 8 extends the provisions of the two preceding sections to investments standing in the joint names of a married woman and any person or persons other than her husband; and by sect. 9, any such investments as aforesaid are transferable by the married woman alone, or by her jointly with such other person or persons aforesaid, as the case may be, without the concurrence of her husband.

These sections extend the Act of 1870 by including shares, &c. in which liability to further payment is incident; by not restricting the powers to sums not less than 20*l.*, and by extending the powers of investment to deposits in any banks (not savings banks only), annuities granted by any person (not government annuities only), and to shares, &c. in any corporation or public body, municipal or otherwise.

By sect. 18, it is provided that—

Married woman as an executrix or trustee.

> "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole.*"

And now by the Married Women's Property Act, 1907, a married woman can dispose of real or personal property held by her as trustee or personal representative as if she were a *feme sole.*

Settled Land Acts.

As to mortgages of settled lands of which a married woman is tenant for life, see Chapter XXII.

No restraint on anticipation where no separate use.

vi.—Restraint on Anticipation.—A restraint on alienation or anticipation of income given to a married woman is inoperative, unless the income is given to her for her separate use or is her separate property by statute, and a gift to her separate use will not be implied from the mere fact that this is restrained from anticipation (*r*).

Effect of restraint.

The clause against anticipation prevents any mortgage or charge by a married woman (*s*); but arrears, after they have fallen due, may, notwithstanding the clause against anticipation, be assigned or charged by her (*t*), and have been held to be liable under a sequestration for costs directed to be paid by her (*u*), and it is now settled that such arrears are available in execution upon a judgment against the married woman, if accrued due at or before the date of the judgment (*x*), but not otherwise (*y*).

To what property restraint attaches.

A Court of equity will give effect during coverture to a clause in restraint of alienation annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, and whether it be in fee or absolute, or only for life (*z*). With regard to personal estate, it was formerly considered that a clause restraining anticipation on an absolute gift of a fund, not producing income, is ineffectual to prevent the married woman from dealing with it; but it appears to be now settled that there is no distinction between alienation and anticipation, and that the restraining clause is effectual whether the fund produces income or not, as it is the duty of the trustees or the Court to invest (*a*).

Where a fund, subject to a particular estate, is given absolutely to a married woman with a restraint on anticipation, the restraint will not, unless such intention appears, be confined to the continuance of that particular estate (*b*).

Fraud.

The clause against anticipation is such a protection against

(*r*) *Baggett* v. *Meux*, 1 Ph. 627; *Stogdon* v. *Lee*, (1891) 1 Q. B. 661. As to what expressions will amount to a restriction on anticipation, see *Harnett* v. *M'Dougall*, 8 Beav. 187; *Moore* v. *Moore*, 1 Coll. 54; *Medley* v. *Horton*, 14 Sim. 222; *Harrop* v. *Howard*, 3 Ha. 624; *Baker* v. *Bradley*, 7 De G. M. & G. 597.

(*s*) *Re Vardon's Trusts*, 31 Ch. D. 275, at p. 280.

(*t*) *Harman* v. *Richards*, 10 Ha. 81; *Re Brettle, Brettle* v. *Burdett*, 2 De G. J. & S. 79.

(*u*) *Claydon* v. *Finch*, L. R. 15 Eq. 266; *Hyde* v. *Hyde*, 15 P. D. 166, C. A.

(*x*) *Hood-Barrs* v. *Heriot*, (1896) A. C. 174.

(*y*) *Whiteley* v. *Edwards*, (1896) 2 Q. B. 48, C. A.

(*z*) *Baggett* v. *Meux*, 1 Ph. 627; *Re Gaskell's Trusts*, 11 Jur. N. S. 780; *Re Ellis' Trusts*, L. R. 17 Eq. 409.

(*a*) *Re Bown, O'Haloran* v. *King*, 27 Ch. D. 411; *Re Grey's Settlement, Acason* v. *Greenwood*, 34 Ch. D. 712, C. A. See *Gibson* v. *Way*, 32 Ch. D. 361.

(*b*) *Re Tippett and Newbould's Contract*, 37 Ch. D. 444, C. A.

the acts of the wife that its effect is not nullified even by her fraud (*c*).

Power of appointment.

Where a limited power of appointment is given to a married woman, and a clause against anticipation is attached to the power, and, in default of appointment, the estate is limited to her separate use generally, she may dispose of the estate without regard to the power (*d*).

Rule against perpetuities.

Where the clause against anticipation is obnoxious to the rule against perpetuities (*e*), the limitation to the separate use is good, and the clause against anticipation is void, and the married woman can mortgage or otherwise deal with the property as if no such clause existed (*f*). Where the limitation is to a class of daughters, some of whom are in existence at the date of the settlement or the death of the testator, the clause is valid as to them, though void as to those unborn (*g*).

Exercise of powers under Settled Land Acts.

The restraint does not prevent the exercise of the powers conferred by the Settled Land Act, 1882, upon a tenant for life who is a married woman (*h*). But a restraint on anticipation attached to an estate in fee simple does not constitute a married woman a tenant for life within the meaning of the Act, or enable her to exercise the statutory powers of a tenant for life (*i*).

Removal of restraint.

By the Conveyancing Act, 1881, s. 39, the Court was empowered, with the consent of the married woman, to bind her interest, notwithstanding a clause against anticipation (*k*). This section is repealed and replaced by sect. 7 of the Conveyancing Act, 1911 (*l*), which extends the former provision to property which she is restrained from alienating or which she is by law unable to dispose of or bind, including a reversionary interest under her marriage settlement.

An order will only be made if it is clearly for her

(*c*) *Jackson* v. *Hobhouse*, 2 Mer. 483; *Clive* v. *Carew*, 1 J. & H. 199; *Arnold* v. *Woodhams*, L. R. 16 Eq. 29; *Stanley* v. *Stanley*, 7 Ch. D. 589. See *Re Glanvill, Ellis* v. *Johnson*, 31 Ch. D. 532, at p. 537.

(*d*) *Barrymore* v. *Ellis*, 8 Sim. 1; *Brown* v. *Bamford*, 1 Ph. 626; *Vaughan* v. *Vanderstegen*, 2 Drew. 188.

(*e*) See as to this, *Re Ridley, Buckton* v. *Hay*, 11 Ch. D. 645.

(*f*) *Fry* v. *Capper*, Kay, 163; *Re Teague's Settlement*, L. R. 10 Eq. 564; *Re Cunningham's Settlement*, L. R. 11 Eq. 324; *Re Ridley, Buckton* v. *Hay*, 11 Ch. D. 645.

(*g*) *Herbert* v. *Webster*, 15 Ch. D. 610; *Cooper* v. *Laroche*, 17 Ch. D. 368; *Re Ferneley's Trusts*, (1902) 1 Ch. 543.

(*h*) 45 & 46 Vict. c. 38, s. 61 (6).

(*i*) *Bates* v. *Kesterton*, (1896) 1 Ch. 159.

(*k*) 44 & 45 Vict. c. 41, s. 39.

(*l*) 1 & 2 Geo. V. c. 37.

benefit (*m*), as where she is harassed by debts (*n*), and living separate from her husband (*o*).

Restraint on anticipation was removed so as to enable the income of a fund to which a wife was entitled for life to be applied in keeping down interest on a mortgage effected jointly by her and her husband, and in paying premiums on policies on his life forming part of the security, on the mortgagees undertaking to reduce the rate of interest, and not to call in the principal without the leave of the Court (*p*). But the Act does not enable the Court to remove the restraint for the purpose of paying debts which are those of the husband alone (*q*), nor for the purpose of obtaining a mere increase of income (*r*). See, generally, as to the considerations which may influence the Court in the exercise of its power to remove the restraint, the cases cited in the note (*s*).

The consent of the woman should generally be obtained by separate examination (*t*).

Restraint not affected by Act.

The Act (*u*) makes no alteration in the law as to the validity and effect of restraints on anticipation. A married woman now, as before the Act, can only dispose of, or contract in relation to, her separate property which she is not restrained from anticipating.

By sect. 19 of that Act, it is enacted that no restriction against anticipation in a settlement of a woman's own property made by herself shall be valid against debts contracted by her before marriage.

Where a judgment had been recovered against a married woman who subsequently obtained a dissolution of her marriage and married again, and on such second marriage settled her property to her separate use without power of anticipation, it was held that, the debt having been contracted before the

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(*m*) *Tamplin* v. *Miller*, W. N. (1882) 44; *Warren's Settlement*, 52 L. J. Ch. 928, C. A.; *Re Little's Will*, 36 Ch. D. 701, C. A.

(*n*) *Hodges* v. *Hodges*, 20 Ch. D. 749, Fry, J.; *Re C.'s Settlement*, 56 L. T. 299.

(*o*) *Exp. Thompson*, W. N. (1884) 28.

(*p*) *Re Milner's Settlement*, (1891) 3 Ch. 547.

(*q*) *Re S.'s Settlement*, W. N. (1893) 127. But see *Paget* v. *Paget*, (1898) 1 Ch. 470, C. A.

(*r*) *Re Blundell*, (1901) 2 Ch. 221, C. A.

(*s*) *Re Jordan*, 55 L. J. Ch. 330; *Re Currey*, 56 L. J. Ch. 389; *Re Seagrave's Trusts*, 17 L. R. Ir. 373; *Re Tippett and Newbould's Contract*, 37 Ch. D. 444, C. A.; *Re Little*, 40 Ch. D. 418, C. A.; *Re Tennant's Estate*, 25 L. R. Ir. 522; *Re Pollard's Settlement*, (1896) 2 Ch. 552, C. A.

(*t*) *Hodges* v. *Hodges*, 20 Ch. D. 749; *Musgrave* v. *Sandeman*, 48 L. T. 215. See *Harris* v. *Harford*, W. N. (1888) 190.

(*u*) 45 & 46 Vict. c. 75.

second marriage within sect. 19, the restraint on anticipation was void as against it (*x*).

By the Married Women's Property Act, 1907 (*y*), it is provided that notwithstanding sect. 19 of the Act of 1882, a settlement by the husband before or after marriage of the wife's property shall not be valid unless executed by her when of full age, or confirmed by her after attaining full age.

By the Married Women's Property Act, 1893 (*z*), s. 2, it is enacted that:—

Costs may be ordered to be paid out of property subject to restraint on anticipation.

> "In any action or proceeding now or hereafter to be instituted by a woman, or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction, by judgment or order from time to time, to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and a sale of the property or otherwise, as may be just."

It is conceived that the words "or otherwise" empower the Court in a proper case to direct the costs to be raised by mortgage of property which a married woman is restrained from anticipating. It is to be observed that this section only applies to an action or counterclaim by a married woman (*a*), and does not apply to an action or proceeding instituted against a married woman, nor to steps taken by her in proceedings initiated by another (*b*).

Contracts by married women under the old law.

vii.—Liability of Married Women under Covenants for Payment of Mortgage Moneys.—The former doctrine, as to the liability of the separate estate of a married woman to her engagements, was, that she must show an intention, either express or by implication, to create a charge; and for this purpose a bond, or promissory note, or other general security in writing, was considered necessary (*c*). But, according to recent cases, such property is liable to her general engagements,

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(*x*) *Jay* v. *Robinson*, 25 Q. B. D. 467, C. A.

(*y*) 7 Edw. VII. c. 18, s. 2.

(*z*) 56 & 57 Vict. c. 63.

(*a*) *Hood-Barrs* v. *Cathcart*, (1895) 1 Q. B. 873.

(*b*) *Hood-Barrs* v. *Cathcart*, (1897) A. C. 177; *Hollington* v. *Dear*, W. N. (1895) 35. For form of order, see *Davies* v. *Treharris Brewery Co.*, W. N. (1894) 198.

(*c*) *Hulme* v. *Tenant*, 1 Bro. C. C. 16; *Stuart* v. *Lord Kirkwall*, 3 Madd. 387; *Greatley* v. *Noble*, 3 Madd. 79; *Bullpin* v. *Clarke*, 17 Ves. 365.

though no written instrument is executed; upon the ground that, having a power to deal with the property, she has the other powers incident to property in general, viz., the power of contracting debts to be paid out of it, and, inasmuch as her creditors had not the means at law of compelling payment of those debts, a Court of equity took upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate estate as the only means by which they might be satisfied (*d*).

Thus, independently of the statutory enactments to be presently considered, the separate estates of married women are bound by their debts, obligations, and engagements, contracted with reference to and upon faith of those estates; and a married woman may render her separate property liable to a charge without having in the transaction made any direct charge on, or made any reference to, the property settled to her separate use (*e*). The Court will readily assume, in the absence of contrary intention, that the contract was entered into upon the faith of the separate estate, so as to create a valid charge thereon.

Thus, the separate estate and savings therefrom, and investments from savings, are bound by her contract in taking shares in a company (*f*); and are liable for the rent of a house occupied by her, when living separate from her husband (*g*).

When a married woman, having separate estate, and living apart from her husband, contracts debts, the Court will impute to her the intention of dealing with such separate estate (*h*).

Operation of covenant for payment by married woman.

If a mortgage deed contains a covenant by a married woman for payment of principal and interest, such covenant will not, strictly speaking, operate as such, so as to bind her personally; "her person cannot be made liable, either at law or in equity; but, in equity, her property may" (*i*); and the Married Women's Property Act, 1882, does not appear to make any change in the law in this respect. The covenant will, however, operate

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(*d*) See *Owens* v. *Dickenson*, Cr. & Ph. 53, 54; *Murray* v. *Barlee*, 2 My. & K. 220.

(*e*) Per Lord Langdale in *Crosby* v. *Church*, 3 Beav. 485, at p. 489. See also *Smith* v. *Smith*, 9 Beav. 80; *Skinner* v. *Todd*, W. N. (1881) 166.

(*f*) *Re Leeds Banking Co.*, L. R. 3 Eq. 781; *Butler* v. *Cumpston*, L. R. 7 Eq. 16.

(*g*) *Gaston* v. *Frankum*, 16 Jur. 507.

(*h*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 494; *MacHenry* v. *Davies*, L. R. 6 Eq. 462; *S. C.*, L. R. 10 Eq. 88; *Picard* v. *Hine*, L. R. 5 Ch. 274; *Hodgson* v. *Williamson*, 15 Ch. D. 87.

(*i*) Per Turner, L.J., in *Johnson* v. *Gallagher*, 3 De G. F. & J. 494, at p. 519. See also *Hulme* v. *Tennant*, 1 Bro. C. C. 15, at p. 21; *Aylett* v. *Ashton*, 1 My. & Cr. 105.

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as a contract binding upon her general separate estate, inasmuch as, according to what is now the settled doctrine of the Court, the separate estates of married women are bound by their debts, obligations, and engagements contracted with reference to, and upon the faith or credit of, those estates (*j*). Before the Married Women's Property Act, 1882 (*k*), a married woman could only bind property to which she was entitled for her separate use, free from restraint on anticipation, at the time of entering into the covenant or contract (*l*).

Charging decree.

A mortgagee seeking to enforce his remedy against the general separate estate of a married woman under her covenant or contract for payment, irrespective of his remedy against the particular fund specifically charged, must get a decree charging the general separate estate (*m*).

Costs.

The costs of the suit will fall upon the separate estate (*n*), unless there is a clause against anticipation (*o*).

Where proceedings are already pending, an order against the separate estate can be made without further suit (*p*).

Form of order.

The order must state that the sum to be recovered is to be payable out of the separate property as therein mentioned and not otherwise, and must direct that execution thereon is to be limited to the separate property not subject to a restraint against anticipation (*q*).

An injunction will not be granted against the trustees parting with the fund pending the trial of the action, in the case of a general engagement (*r*).

But the Court will appoint a receiver of a fund coming to a married woman out of which costs have been ordered to be paid (*s*).

In all cases where the separate estate of a married woman is

(*j*) *Johnson* v. *Gallagher*, *sup.*; *MacHenry* v. *Davies*, L. R. 6 Eq. 462; L. R. 10 Eq. 88; *Picard* v. *Hine*, L. R. 5 Ch. 274; *Hodgson* v. *Williamson*, 15 Ch. D. 87.

(*k*) 45 & 46 Vict. c. 75, s. 4. See *infra*.

(*l*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, C. A.

(*m*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 494; *MacHenry* v. *Davies*, L. R. 6 Eq. 462.

(*n*) *MacHenry* v. *Davies*, L. R. 10 Eq. 88, 94; *Morrell* v. *Cowan*, 6 Ch. D. 166, 172.

(*o*) *Moore* v. *Moore*, 1 Coll. 54. As to orders for payment of costs notwithstanding the restraint, see *ante*, p. 344.

(*p*) *Re Peace*, 24 Ch. D. 405, C. A.

(*q*) *Scott* v. *Morley*, 20 Q. B. D. 120. And see *Bursill* v. *Tanner*, 13 Q. B. D. 691.

(*r*) *Robinson* v. *Pickering*, 16 Ch. D. 660, C. A.

(*s*) *Cummins* v. *Perkins*, (1899) 1 Ch. 16.

sought to be charged, independently of statute (*t*), the husband is a necessary party; but no personal judgment can be obtained against either the husband or the wife (*u*). The only judgment is against the separate estate, and if a clause against anticipation is attached, there can be no judgment (*x*).

Contracts by married women under the present law.

The Married Women's Property Act, 1882, enacts as follows as regards the power of a married woman to bind her separate property by covenant or contract entered into on or after the 1st of January, 1883, and the extent of her liabilities thereunder:—

> Sect. 1. "(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her, and any damages or costs recovered by her in any such action or proceeding shall be her separate property, and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.
>
> "(3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.
>
> "(4) Every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire" (*y*).

Remedies of married woman for protection and security of separate property.

By sect. 12, every woman, whether married before or after the Act, is to have in her own name against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property as if such property belonged to her as a *feme sole*.

Thus leave of the Court is no longer necessary to enable her to sue without a next friend or without giving security for costs (*z*), and it makes no difference whether or not the cause of action arose before the Act (*a*).

It was held that, under sub-sects. (3) and (4) of sect. 1, in

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(*t*) *Infra.*

(*u*) *Collett* v. *Dickenson*, 11 Ch. D. 687; *Hancock* v. *Demeric-Lablache*, 3 C. P. D 197.

(*x*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, C. A.; *Perks* v. *Mylrea*, W. N. (1884) 64; *Scott* v. *Morley*, *sup.*

(*y*) This renders obsolete the rule laid down in *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, C. A. See *Cox* v. *Bennett*, (1891) 1 Ch. 617, 622.

(*z*) *Threlfall* v. *Wilson*, 8 P. D. 18.

(*a*) *Severance* v. *Civil Service Association*, 48 L. T. 485.

order to render a married woman capable of binding herself by contract in respect of her separate property, it must be shown, as before the Act (*b*), that she had some separate property at the time when the contract was made (*c*).

Repeal of s. 1 (3) and (4) of Act of 1882.

These sub-sections are now repealed by the Married Women's Property Act, 1893 (*d*), which came into operation on the 5th December, 1893, by sect. 1 of which it is enacted as follows:—

Effect of contracts by married women.

"Every contract hereafter entered into by a married woman otherwise than as an agent,

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such a contract;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating" (*e*).

Joinder of husband in action against wife generally unnecessary.

As under sect. 1 (2) of the Married Women's Property Act, 1882, a married woman may be sued as if she were a *feme sole*, it will be no longer necessary, as hitherto (*f*), to join the husband as defendant, unless the plaintiff seeks to establish his claim either wholly or in part against both of them (*g*), and in case of such unnecessary joinder, the plaintiff will be liable to pay the husband's costs (*g*).

Court may order husband to be made a party.

By Ord. XVII. r. 2, it is provided that, in the case of the marriage of any party to a cause or matter, the Court or judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband be made a party, or be served with notice, on such terms as the Court or judge shall think just (*h*).

(*b*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 494; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, C. A.

(*c*) *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Stogdon* v. *Lee*, (1891) 1 Q. B. 661; *Re Fieldwick*, (1909) 1 Ch. 1.

(*d*) 56 & 57 Vict. c. 63, s. 4.

(*e*) *Barnett* v. *Howard*, (1900) 2 Q. B. 784.

(*f*) *Hancock* v. *Demeric-Lablache*, 3 C. P. D. 197.

(*g*) Sect. 15. As to the meaning of "joint judgment" in this section, see *Beck* v. *Pierce*, 23 Q. B. D. 316, 321, C. A.

(*h*) See *Stanhope* v. *Stanhope*, 11 P. D. 103.

Joinder of claims.

By Ord. XVIII. r. 4, claims by and against a husband and wife may be joined with claims by or against either of them separately.

Married woman as an executrix or trustee.

By sect. 18 of the Act of 1882, a married woman who is an executrix or administratrix, alone or jointly with any other person or persons, of the estate of any deceased person, or a trustee alone or jointly, as aforesaid, of property subject to any trust, may sue or be sued without her husband as if she were a *feme sole*.

Sect. 23 enacts that :—

Legal representative of married woman.

> "For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

By sect. 13 of the Act it is enacted as follows :—

Wife's ante-nuptial debts and liabilities.

> "A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage (*i*), including any sum for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed, or otherwise, if this Act had not passed."

General power of appointment.

With respect to separate use to which a general power is added, if property is settled upon a married woman, for her separate use for her life, with power to dispose of it by deed or

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(*i*) As to what ante-nuptial debts are within this and the following sections, see *Re Hedgeley*, *Small* v. *Hedgeley*, 34 Ch. D. 379; *Beck* v. *Pierce*, 23 Q. B. D. 316, C. A.; *Jay* v. *Robinson*, 25 Q. B. D. 467, C. A.

will, and in default over to a stranger, the Court has never gone further than to affect the limited interest during her lifetime (*k*); but after her death, the *corpus* is subject, as separate property, to her general engagements, whether the power be exercised or not (*l*): *à fortiori*, where, in default of appointment, the limitation is to her executors and administrators (*m*), in which case, the property would be, to all intents and purposes, separate property in her lifetime (*n*).

Power exerciseable by will.

Where the power is exerciseable by will only, and there is a limitation in default of appointment, and the power is not exercised, of course the general engagements of the married woman cannot prevail against the parties entitled in default of appointment (*o*). But if the power is exercised, not for creditors, or if in favour of one particular creditor, the appointed property becomes assets for the payment of the married woman's engagements, to the same extent as the assets of any other person not under the disability of coverture would, under the circumstances, be bound (*p*). Where a married woman with a general power exerciseable by will appoints, and the appointee dies in her lifetime, whether a gift over in default of appointment takes effect or not depends on her intention to make the property her own, as, for instance, by a charge of debts (*q*). It was held under the old law that the exercise by a married woman of a power of appointment by will does not make the property applicable to the payment of her engagements, as charges on her separate estate (*r*); and though in some later cases it has been held that such an appointment does make the property appointed liable to the appointor's debts (*s*), yet it seems that in cases not falling within the Married Women's Property Act, 1882, such an appointment does not make the property liable

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(*k*) *Hulme* v. *Tennant*, 1 Bro. C. C. 15; *Field* v. *Sowle*, 4 Russ. 112.

(*l*) *Heatley* v. *Thomas*, 15 Ves. 596; *Robinson* v. *Dusgate*, 2 Vern. 181; *Mayd* v. *Field*, 3 Ch. D. 587. But see *Hansen* v. *Miller*, 14 Sim. 27.

(*m*) *London Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572; dissenting from *Shattock* v. *Shattock*, L. R. 2 Eq. 182.

(*n*) *London Chartered Bank of Australia* v. *Lemprière*, *sup.*

(*o*) See *Paul* v. *Paul*, 20 Ch. D. 742, C. A.

(*p*) *Nail* v. *Punter*, 5 Sim. 555, 562; *Williams* v. *Lomas*, 16 Beav. 1; *Re Lawley*, *Zaiser* v. *Lawley*, (1902) 2 Ch. 799, C. A.; affd. (1903) A. C. 411. See as to the general liability, *Jenney* v. *Andrews*, 6 Madd. 264.

(*q*) See *De Lusi's Trusts*, 3 L. R. Ir. 232: *Pinède's Settlement*, 12 Ch. D. 667, 672, Jessel, M.R.; *Willoughby Osborne* v. *Holyoake*, 22 Ch. D. 238.

(*r*) *Vaughan* v. *Vanderstegen*, 2 Drew. 165, 184, 191; *Hobday* v. *Peters*, 28 Beav. 603; *Shattock* v. *Shattock*, L. R. 2 Eq. 182.

(*s*) *Re Harvey's Estate*, *Godfrey* v. *Harben*, 13 Ch. D. 216; *Hodges* v. *Hodges*, 20 Ch. D. 749.

to engagements entered into with her on the credit of her separate estate (*t*).

The Married Women's Property Act, 1882, enacts—

Execution of general powers.

> Sect. 4. "The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act" (*u*).

The section applies to debts and obligations contracted by the testatrix when a *feme sole* before as well as after the Act came into force (*x*).

The liability will not attach if she had no separate estate at the time when she contracted the debts (*y*).

The husband, paying off a debt charged on the separate estate, stands in place of the mortgagee, as against the estate of the wife (*z*).

A married woman was not liable to the bankrupt law, even though she had separate estate and had contracted engagements after her marriage. But the law in this respect is now altered as regards married women carrying on trades separately from their husbands (*a*).

Debts incurred by married women may be barred by analogy to the Statute of Limitations (*b*).

Liability of husband for debts of wife before marriage.

Until the Acts next mentioned came into operation, a husband was liable for the debts of his wife incurred before marriage; and the separate estate of a married woman was only liable to her debts before marriage upon the bankruptcy of her husband (*c*); but by the Married Women's Property Acts of 1870 and 1874 (*d*), a husband was not liable for such debts, beyond the assets by the Acts specified and received by him; and the separate property of the wife was liable for them, notwithstanding a clause against anticipation.

The Acts of 1870 and 1874 are, however, repealed by the Married Women's Property Act, 1882.

(*t*) *Re Roper*, *inf.*

(*u*) *Re Hodgson*, (1899) 1 Ch. 666. This section applies only to contracts made after the commencement of the Act: *Re Roper*, *Roper* v. *Doncaster*, 39 Ch. D. 482.

(*x*) *Re Hughes*, *Brandon* v. *Hughes*, (1898) 1 Ch. 529, C. A., distinguishing *Re Roper*, *sup.*

(*y*) *Re Fieldwick*, (1909) 1 Ch. 1; and as to contracts made after 5th December, 1893, see *ante*, p. 348.

(*z*) *Nelson* v. *Booth*, 3 Jur. N. S. 951.

(*a*) 45 & 46 Vict. c. 75, s. 1 (5). See *Re Gardiner*, 20 Q. B. D. 249.

(*b*) *Re Hastings*, *Hallett* v. *Hastings*, 35 C. D. 94.

(*c*) *Chubb* v. *Stretch*, L. R. 9 Eq. 555. See *Beck* v. *Pierce*, 23 Q. B. D 316, 320, C. A.

(*d*) 33 & 34 Vict. c. 93, s. 12; 37 & 38 Vict. c. 50.

By sect. 14 of the Married Women's Property Act, 1882 (*e*), it is enacted that—

> "A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property. Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act, for or in respect of any such debt or other liability of his wife as aforesaid."

viii.—Mortgage by Wife to secure Husband's Debt.—Subject to the Married Women's Property Act, 1882, s. 3, to be presently mentioned, it may be generally stated that where a wife mortgages her property to secure her husband's debt, the estate of the husband is bound to indemnify the estate of the wife against the mortgage.

On the general principle that where one person mortgages his property to secure an advance made to another person, it is the debt of the latter (*f*), the rule is, that where a husband borrows money on the security of his wife's estate, as the money is under his power, it is presumed to come to his use, so as to entitle the wife, on the husband's death, to exoneration out of his personal and real assets (*g*).

Parol evidence is, however, admissible to rebut the presumption, and to show that the money was, in fact, raised and applied for the wife's benefit (*h*).

The question whether the wife is entitled to be indemnified is a matter of inference to be drawn from the circumstances

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(*e*) 45 & 46 Vict. c. 75.

(*f*) *Lee* v. *Rook*, Moseley, 318.

(*g*) *Earl of Kinnoul* v. *Money*, 3 Bro. C. C. 212.

(*h*) *Robinson* v. *Gee*, 1 Ves. 252; *Clinton* v. *Hooper*, 1 Ves. Jun. 173.

of each particular case; and where it appears that the debts, though legally the debts of the husband, were contracted to pay for the extravagant living of both husband and wife, no inference of a right to indemnity will be drawn (*i*).

So where there was a joint banking account in the names of husband and wife, and the wife deposited deeds as a security for an overdraft, it was held that each ought to pay one moiety of the overdraft (*k*).

If the money be raised for the benefit of the husband, the wife is regarded as a surety for her husband, and she or her heir will be a creditor, in the place of the mortgagee, on the husband's estate to the amount of the debt discharged out of her estate (*l*); and will have preference to all legatees of the husband (*m*).

Where a wife concurs with her husband in mortgaging her property, and it appears on the face of the mortgage deed that the money was paid to the husband, or before 1883 to the husband and wife, the Court infers subject to rebutting evidence that the debt is the debt of the husband, and that the wife's property is a surety for it. By way of rebuttal it may be shown either that the money was in fact paid to the wife in such a way as to become her separate property, or that it was applied by the husband for her benefit (*n*).

And even a creditor of the wife has been allowed to sue the wife's executors jointly with persons claiming a fund in Court, which had arisen from the husband's estate, and which fund was subject to an equitable demand of the wife's estate, the executors having refused to take proceedings for establishing the demand; and the claim of the creditor was established (*o*).

Where a wife mortgages her separate property by an instrument which also comprises property of the husband mortgaged by him as security for his debt, she is entitled to exoneration out of his estate in priority to his creditors (*p*).

(*i*) *Paget* v. *Paget*, (1898) 1 Ch. 470, C. A.

(*k*) *Re Shaw*, *Shaw* v. *Jones*, 94 L. T. 93.

(*l*) *Huntington* v. *Huntington*, 2 Vern. 437; *Pocock* v. *Lee*, 2 Vern. 604; *Tate* v. *Austin*, 1 P. Wms. 264; *Parteriche* v. *Powlet*, 2 Atk. 384; *Astley* v. *Tankerville*, 3 Bro. C. C. 545; *Lacon* v. *Mertins*, 1 Ves. Sen. 312; *Clinton* v. *Hooper*, 1 Ves. Jun. 173; *Lancaster* v. *Evors*, 4 Beav. 158; *S. C.*, 10 Beav. 154.

(*m*) *Tate* v. *Austin*, 1 P. Wms. 264; *Hudson* v. *Carmichael*, Kay, 613.

(*n*) *Hall* v. *Hall*, (1911) 1 Ch. 487, following *Hudson* v. *Carmichael*, Kay, 613, 620.

(*o*) *Lancaster* v. *Evors*, 4 Beav. 158; *S. C.*, 10 Beav. 154.

(*p*) *Aguilar* v. *Aguilar*, 5 Mad. 414.

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Where property over which a married woman has a power is mortgaged for the husband's debt, he is primarily liable (*q*), but not so when money is raised for the husband by the exercise by husband and wife of a joint power of appointment, as the estate of the wife cannot be said to be charged (*r*).

If money be raised by the husband to pay off debts of his wife incurred *dum sola*, the wife's estate must bear the burden (*s*); and the like, it seems, will be the case if the principal part of the money raised is applied for such purpose, and the residue retained by the husband for his own benefit (*t*), because the mortgage being a single transaction, the Court will suppose the intention of the parties to be uniform, and that such intention was to charge the wife's estate with the whole debt.

If the wife, or her heir after the husband's death, promise to relinquish their claim, parol evidence is admissible of such agreement. But it seems that evidence will not be received of a declaration on the part of the wife that the money was intended by her as a *gift* to her husband, contrary to the express language of the deed (*u*).

The claim of the wife will not be waived by her covenant after her husband's death that the estate shall stand charged with the original debt, and also with a further sum advanced to her (*x*).

The husband will have a right to be indemnified out of the estate of the wife, if on a transfer of a mortgage charged on the wife's estate he enter into a covenant, or give bond for its payment (*y*); and if the husband reduces the amount and dies, his estate will be entitled to stand in the place of the mortgagee to the amount of principal paid by him (*z*), but not of interest (*a*); and if, at the time of mortgaging the wife's estate, the husband make a provision out of his own estate for his wife's benefit, he may, under the circumstances, be considered as a purchaser of the money raised by the mortgage (*b*).

(*q*) *Thomas* v. *Thomas*, 2 K. & J. 79.

(*r*) *Scholefield* v. *Lockwood*, 4 De G. J. & S. 22.

(*s*) *Lewis* v. *Nangle*, Amb. 150; *Bagot* v. *Oughton*, 1 P. Wms. 347; *Earl of Kinnoul* v. *Money*, 3 Swanst. 208.

(*t*) *Lewis* v. *Nangle*, *sup.*

(*u*) *Clinton* v. *Hooper*, 1 Ves. Jun. 173.

(*x*) *Lacon* v. *Mertins*, 1 Ves. Sen. 312.

(*y*) *Bagot* v. *Oughton*, 1 P. Wms. 347.

(*z*) *Pitt* v. *Pitt*, T. & R. 180, entered in register book as *Pitt* v. *Reid*.

(*a*) *Ruscombe* v. *Hare*, 2 Bli. N. S. 192.

(*b*) *Lewis* v. *Nangle*, Amb. 150.

Loan for purpose of trade.

ix.—Loan by Wife to Husband.—By the Married Women's Property Act, 1882, s. 3, any loan by a wife to her husband "for the purpose of any trade or business carried on by him or otherwise," is to be treated as assets of the husband in case of his bankruptcy ; and the wife cannot prove in respect of such loan until all the other creditors are satisfied.

The section does not apply to a loan to a firm of which the husband is a partner (*c*), nor to sums lent to the husband for private purposes (*d*), but the onus is generally on the wife to prove that the loan was made for a purpose unconnected with the husband's trade or business (*e*).

It would seem, by analogy, that the section does not prevent a wife from enforcing any security she may have taken from her husband for the loan (*f*).

The section does not affect the right of retainer of a wife who is the executrix of her husband in respect of a loan made to him for the purposes of his business (*g*).

The section applies to a loan of furniture (*h*).

Interest.

Where money is lent to a husband, not for the purpose of his trade, by his wife's trustees, and the husband does not pay any interest on the debt, the wife will be presumed to have given the arrears of interest to the husband, so that the debt will not become statute-barred during her life. And if the husband received the advance with full knowledge of the trust, he would be in the position of a trustee as regards raising the defence of the statute (*i*).

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Section II.

Mortgages of Property of Infants.

Disability of infancy.

i.—Disability of Infancy.—An infant, being generally incapable of binding himself by contract, cannot of himself enter

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(*c*) *Re Tuff, Exp. Nottingham*, 19 Q. B. D. 88.

(*d*) *Re Clark, Exp. Schulze*, (1898) 2 Q. B. 330, C. A.

(*e*) *Re Genese, Exp. District Bank*, 16 Q. B. D. 700 ; *Re Cronmire*, (1901) 1 K. B. 480, C. A.

(*f*) See *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536 ; 38 Ch. D. 238.

(*g*) *Woodhead* v. *Ambler*, (1905) 1 Ch. 697, C. A.

(*h*) *Re Donaldson*, (1902) 2 Ir. R. 310.

(*i*) *Re Dixon, Heynes* v. *D.*, (1900) 2 Ch. 561, C. A.

into a contract of mortgage, or create a valid security on his property for mortgage moneys.

Custom of gavelkind.

Although an infant may by the custom of gavelkind convey by feoffment with livery of seisin, yet this must be taken strictly, and extends only to sales for valuable consideration ; the liberty of selling was allowed for the convenience of commerce, which in the case of small divided shares was absolutely necessary (*k*); and accordingly it is clear that the custom does not enable an infant to create or concur in a mortgage of gavelkind lands.

Mortgage of infants' lands for payment of ancestor's debts.

ii.—Power to mortgage Property of Infants.—Where a suit is instituted in any Court of equity for the payment of debts of a deceased person to which his heir or devisee is liable, and such heir or devisee is an infant, the Court may direct a mortgage as well as a sale of the estates of such infant heir or devisee. And where any hereditaments are devised in settlement by a person whose estate is liable to the payment of his debts, so as to vest in any person for life or other limited interest, with remainder over, the Court may authorize such sales and mortgages to be made in cases where such tenant for life or other person having a limited interest is an infant.

Devolution of surplus moneys.

The surplus of money arising from such sale or mortgage is to descend in the same manner as the estates so sold or mortgaged would have done if no such sale or mortgage had been made.

Power of Court to direct conveyance of infants' lands.

The Court may direct, and, if necessary, compel such infant to convey the estates to the mortgagee in such manner as the Court thinks proper and directs, and the infant must convey accordingly, and the conveyance is to be valid and effectual to all intents and purposes as if the infant had been of full age at the time of executing the same (*l*).

Mortgage of infant's property for repairs.

The Court has no power, under the enactments above referred to, in an administration action, in which a certain sum is decreed to be raised out of the testator's real estate for payment of debts, to add to the sum required for that purpose a further sum for repairs of the property, although without such repairs the money could not be raised, and a mortgage would be much more beneficial to the infant heir or devisee than a sale (*m*).

(*k*) Sandys' Cons. Kanc. 169; Bac. Abr. vol. iv. 7th ed. p. 49; *Re Maskell and Goldfinch's Contract*, (1895) 2 Ch. 525, 528.

(*l*) See stats. 11 Geo. IV. & 1 Will. IV. c. 47; 2 & 3 Vict. c. 60.

(*m*) *Hill* v. *Maurice*, 1 De G. & S. 214.

The Court, however, has jurisdiction, upon the principle of salvage, to order a mortgage of the lands to which an infant is entitled in possession for repairs; but the jurisdiction is jealously exercised, and only to the extent of such repairs as may be certified to be absolutely necessary (*n*). And the jurisdiction apparently extends so as to enable the Court, with the concurrence of the next remainderman, to charge the interest of an infant actually entitled as tenant in tail (*o*), but not so as to enable the Court to charge the interest of an infant tenant for life in remainder (*p*).

Mortgage to raise money for fines.

The Court has, apparently, no jurisdiction to order a fine payable for admittance to copyholds of a customary heir, who is an infant, to be raised by mortgage of the copyholds (*q*).

Redemption of land tax.

Where the guardian of an infant tenant in tail redeems the land tax, the sum paid is a charge on the inheritance (*r*), although no declaration has been made according to the statute 38 Geo. III. c. 60 (*s*).

Mortgage of infant's ship.

The guardian of an infant, who is the registered owner of a ship, has no power under the Merchant Shipping Act (*t*) to sell or mortgage the ship on behalf of the infant (*u*).

Settled Land Acts.

As to mortgages of lands of infants under the Settled Land Acts, see Chap. XXII. (*x*).

Maintenance.

As to mortgages and charges for maintenance of infants, see Chap. XXIII. (*y*).

Mortgage paid off out of infant's personalty.

If the personal estate of an infant be applied in paying off a mortgage debt secured on his real estate, the debt will be kept alive as personal estate (*z*).

Contracts by infants for repayment of loans are void.

iii.—Avoidance of Contracts by Infants to repay Loans.—By the Infants' Relief Act, 1874 (*a*), all contracts, whether by specialty or by simple contract, entered into by infants for the repayment of money lent or to be lent (other than contracts for

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(*n*) *Re Jackson, Jackson* v. *Talbot*, 21 Ch. D. 786. See *Re Hurst, Hurst* v. *Hurst*, 29 L. R. Ir. 219; *Re Montagu's Settlement, Darbishire* v. *Montagu*, (1897) 2 Ch. 8, C. A.; *Re Willis, inf.; Neill* v. *N.* (1904), 1 Ir. R. 513.

(*o*) *Re Hawker's Settled Estates*, 66 L. J. Ch. 341, but see *post*, p. 441.

(*p*) *Re De Teissier's Settled Estates*, (1893) 1 Ch. 153. See *Re Willis*, (1902) 1 Ch. 15, C. A.

(*q*) *Harbroe* v. *Combs*, 43 L. J. Ch. 336.

(*r*) *Ware* v. *Polhill*, 5 De G. & S. 455.

(*s*) *Ibid.*; *Bulkeley* v. *Hope*, 1 K. & J. 482.

(*t*) 57 & 58 Vict. c. 60.

(*u*) *Michael* v. *Fripp*, L. R. 7 Eq. 95.

(*x*) *Post*, p. 395.

(*y*) *Post*, p. 436.

(*z*) *Seys* v. *Price*, 9 Mod. 217, 221; *Exp. Phillips*, 19 Ves. 122.

(*a*) 37 & 38 Vict. c. 62, s. 2.

necessaries) are absolutely void, and no action can be brought on any promise made after coming of age to pay any debt contracted during infancy, nor on any ratification of a contract made during infancy, whether there is new consideration or not.

Penalty on inciting infants to borrow.

The Betting and Loans (Infants) Act, 1892 (*b*), provides that persons sending to infants circulars, and inciting them to borrow money, are to be guilty of misdemeanour. And by sect. 5 of the same Act it is enacted as follows:—

Avoiding contract for payment of loan advanced during infancy.

> "If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever.
>
> "For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan."

Effect of this enactment.

The effect of the above enactments seems to be that an infant cannot during infancy mortgage or charge, or agree to mortgage or charge, his property to secure a loan, nor will any such mortgage, charge, or agreement to secure a loan made to him during infancy be valid, unless the loan was for the purpose of paying for necessaries, but that a debt for necessaries or a loan made to him during infancy for the purpose of paying for necessaries will be a sufficient consideration to support a mortgage or charge of his property made on attaining full age (*c*).

Fresh mortgage on attaining full age.

But where an infant gave a mortgage which was reconveyed to him on his coming of age, and a fresh mortgage was executed by him of the same property to secure a larger amount, it was held that this was not a mere ratification, but that the mortgage was a valid security for the whole amount (*d*).

The Building Societies Act, 1874, s. 38, does not enable an infant to borrow money on mortgage. A mortgage by an

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(*b*) 55 & 56 Vict. c. 4; cf. *Re Foulkes*, 69 L. T. 183, as to the law before the Act. As to presumption of knowledge of infancy, see Money-lenders Act, 1900, s. 5.

(*c*) See as to loans of money for necessaries, Com. Dig. tit. Enfant (c), 2; *Probert* v. *Knouth*, 2 Esp. 472, n.; *Hedgeley* v. *Holt*, 4 C. & P. 104; *Martin* v. *Gale*, 4 Ch. D. 428.

(*d*) *Re Foulkes*, *Foulkes* v. *Hughes*, 69 L. T. 183.

infant to a building society to secure advances made to the infant for the purpose of building is void, and in the absence of fraud on the part of the infant will be ordered to be cancelled. But where an infant borrows money on mortgage for the purpose of purchasing land the transaction is voidable only, and the infant cannot on coming of age affirm the purchase and repudiate the mortgage. If he affirms the purchase the lender has a lien to the extent to which his money discharged the vendor's lien (*e*).

Quære whether an infant is not liable in equity to pay a debt incurred by fraud (*f*).

◆

SECTION III.

MORTGAGES OF PROPERTY OF LUNATICS.

Jurisdiction to order mortgage of lunatic's property under 43 Geo. III. c. 75.

i.—Jurisdiction to mortgage Property of Lunatics.—Independently of statutory enactment, neither the committee of a lunatic nor any other person has power to mortgage or charge the lunatic's property; but such property could be mortgaged or charged with the sanction of the Lord Chancellor, under the statute 43 Geo. III. c. 75 (*g*).

Lunacy Regulation Act, 1853.

This statute was repealed, but its provisions were adopted and amended by the statute 1 Will. IV. c. 65, which was, in its turn, repealed by the Lunacy Regulation Act, 1853 (*h*). This Act provided that the Lord Chancellor might order that any estate or interest of a lunatic in land or stock should be sold, or charged and encumbered by way of mortgage, for raising money for the payment of his debts or engagements, the discharge of incumbrances on his estate, and the costs of the commission of lunacy, and the costs of such disposition (*i*).

This jurisdiction of the Lord Chancellor was extended to the

(*e*) *Thurstan* v. *Nottingham Building Soc.*, (1902) 1 Ch. 1, C. A.; affd. (1903) A. C. 6.

(*f*) *Ibid.*; *Exp. Jones*, *Re Jones*, 18 C. D. 109, C. A.

(*g*) *Foster* v. *Marchant*, 1 Vern. 262. See *Exp. Smith*, 5 Ves. 556; *Exp. Dikes*, 8 Ves. 79; *Re Halforde*, 1 Jur. 524; *Exp. Birch*, 3 Swanst. 98.

(*h*) 16 & 17 Vict. c. 70, ss. 116—139, amended 25 & 26 Vict. c. 86, ss. 13, 16.

(*i*) As to the restriction of this provision to mortgages, &c. of land, see per Chitty, J., in *Re Freer*, 22 Ch. D. at p. 627.

Lords Justices of Appeal, and other judges entrusted with the care and commitment of the persons and estates of lunatics (*k*).

Lunacy Act, 1890, s. 117.

The Act of 1853, and its amending Acts, have been repealed by the Lunacy Act, 1890 (*l*), by sect. 117 of which it is enacted as follows :—

Power to raise money for certain purposes.

"(1) The judge may order that any property of the lunatic, whether present or future, be sold, charged, mortgaged, dealt with, or disposed of as the judge thinks most expedient for the purpose of raising or securing, or repaying with or without interest, money which is to be or which has been applied to all or any of the purposes following:—

(a) Payment of the lunatic's debts or engagements.
(b) Discharge of any incumbrance on his property.
(c) Payment of any debt or expense incurred for the lunatic's maintenance or otherwise for his benefit.
(d) Payment of or provision for the expenses of his future maintenance.

"(2) In case of a charge or mortgage being made under this Act for the expenses of future maintenance, the judge may direct the same to be payable, either contingently if the interest charged is a contingent or future one, or upon the happening of the event if the interest is depending on an event which must happen, and either in a gross sum or in annual or other periodical sums, and at such times and in such manner as he thinks expedient."

Present state of the law.

The alterations in the law as regards mortgages and charges of the property of lunatics introduced by the present Act, and the rules made thereunder, seem to be as follows :—

Exercise of jurisdiction.

1. The jurisdiction to direct such mortgages and charges to be made is exerciseable by the judges in lunacy (*m*).

Extent of jurisdiction.

2. The jurisdiction extends so as to authorize mortgages, &c. of any property of a lunatic, that is to say, real or personal property, whether in possession, reversion, remainder, contingency, or expectancy, and any estate or interest, and any undivided share therein (*n*).

Purposes for which jurisdiction may be exercised.

3. A mortgage or charge may be ordered not only, as formerly, for payment of the lunatic's debts or engagements, or of any incumbrance on his property, but for his past or future maintenance, or otherwise for his benefit (*nn*), but not for the maintenance of his wife (*o*).

Procedure.

4. Applications under sect. 117 may be made with regard to

(*k*) Lunacy Act, 1890, s. 108.

(*l*) 53 Vict. c. 5.

(*m*) See sect. 108.

(*n*) See sect. 341.

(*nn*) See *Re Beavan*, (1912) 1 Ch. 196.

(*o*) *Re Winkle*, (1894) 2 Ch. 519.

the property not only of lunatics so found by inquisition, but also of persons not so found, including persons who, through mental infirmity arising from disease or age, are incapable of managing their own affairs (*p*). The application must be made, in the case of a lunatic so found, by his committee (*q*), and, in the case of a person not so found, by a person authorized to make such application by order of the judge or a master (*r*). The application must be by summons at chambers before the masters, unless the judge or the masters otherwise direct (*s*), and the summons should be accompanied by evidence showing that the application is just and reasonable, or otherwise for the benefit of the lunatic (*t*). If the application relates to property of a person of unsound mind not so found, seven clear days' notice must be given to such person by service of a copy of the summons, indorsed with a notice signed by the applicant or his solicitor (*u*). An affidavit of service must be filed, and the person served may file a notice of objection (*x*). If the master is satisfied, upon the evidence, of the propriety of the application, he certifies to the judge accordingly; and on confirmation of the certificate, the master settles and approves a proper mortgage, and the committee, or other authorized person, upon payment to him, or as may be directed, of the amount to be raised, shall, in the name and on behalf of the lunatic, execute the mortgage when so settled and approved, and do all such other acts as are necessary to effectuate the same, and shall, out of the income of the estate of the lunatic or person of unsound mind, pay and keep down the interest on the mortgage (*y*).

In other respects, it would appear that the former law and practice with regard to mortgages and charges of lunatics' estates are unaltered, and that the decisions under the earlier statutes are still in force.

Benefit of lunatic to be considered.

An order directing a mortgage or charge on the property of a lunatic will not be made unless it is shown to be just and reasonable, and for the lunatic's benefit. Thus the Lord Chancellor refused the application of a lunatic's father, tenant for life

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(*p*) See sect. 116 of the Act, and rule 56, and forms 10 and 11 in Sched. to Rules of 1892.

(*q*) *Re Townshend*, 2 De G. J. & S. 519.

(*r*) See 8 Edw. VII. c. 47, s. 1.

(*s*) Rules in Lunacy, 1892, r. 19.

(*t*) *Re Fox*, 33 Ch. D. 37.

(*u*) Rule 48, and Form 8 in Sched. to Rules of 1892.

(*x*) Rules 49 and 50, and Form 9 in Sched.

(*y*) Rule 123. See Pope's Law of Lunacy, 2nd ed. 186, 187.

of large landed estates, for an order charging the estate of the lunatic tenant in tail in remainder with a sum found by the master to be proper for the lunatic's maintenance, there being no special circumstances nor any evidence that the state of the applicant's family was such as to make the charge just and reasonable (*z*). So, also, if the application is for the purpose of paying the lunatic's debts, the Court will not order a mortgage or charge if it appears that the application is really for the benefit of the creditors, and not of the lunatic, nor unless it is shown that the charge will leave a sufficient maintenance for the lunatic (*a*).

Mortgage of lunatic's estate to pay debts of ancestor.

In a recent case, an order was made authorizing the committee of a lunatic co-heiress-at-law to concur with the other co-heiress in raising money to pay the debts of their common ancestor by a mortgage of the entirety of the property derived from him, the Court being of opinion that it was clearly for the benefit of the lunatic's estate that the money should be raised in order to avoid the necessity of a suit for the administration of the estate of the ancestor; it was, however, ordered that the mortgage should be so framed that the lunatic's moiety of the property could not be made liable for any default of the other co-owner in payment of her moiety of the principal and interest (*b*).

Jurisdiction limited to specified purposes.

The power of ordering a mortgage or charge under sect. 117 of the Act is strictly limited to the purposes specified. So, orders for sale have in several cases been refused, where it has not been shown to the satisfaction of the Court that the money was required for one or other of such purposes (*c*). But the mere fact that the money required might be raised by some other means will not prevent the Court from making the order, if the advantage of the lunatic will be promoted thereby (*d*).

Third parties not affected.

An order in lunacy affecting the property of the lunatic does not, it seems, affect the legal or equitable rights of third parties against the property—as, for instance, the rights of creditors or a vendor's lien (*e*). Nor will the Court prevent a judgment creditor from issuing execution against the lunatic's property if

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(*z*) *Re Pugh*, 3 De G. M. & G. 416.

(*a*) *Exp. Hastings*, 14 Ves. 182; *Re Railton*, 1 Jur. 574; *Re Tayler*, 3 Mac. & G. 427. But see *Exp. Hall*, Jac. 161. See also *Horne* v. *Pountain*, 23 Q. B. D. 264; *Re Plenderleith*, (1893) 3 Ch. 332, C. A., and cases there cited.

(*b*) *Re Fox*, 33 Ch. D. 37, C. A.

(*c*) *Re Vavasour*, 3 Mac. & G. 275; *Re Corbett*, L. R. 1 Ch. 117; *Re Winkle*, (1894) 2 Ch. 519.

(*d*) *Exp. Phillips*, 19 Ves. 124.

(*e*) *Davis* v. *Thomas*, (1900) 2 Ch. 462, C. A. And see *Re Brown, Llewellin* v. *B.*, (1900) 1 Ch. 489.

the execution does not interfere with the possession of an officer of the Court (*f*).

Costs of partition suit.

Where a decree in a partition suit, of the estate of a lunatic tenant in tail, directed the costs to be raised out of the estate, but, instead thereof, the land was conveyed to the lunatic tenant in tail, the Lords Justices held that they had no power to authorize the committee to raise the costs by mortgage (*g*); but an indorsement was made on the partition deed of a declaration that the costs were to be a prior charge (*h*).

Costs generally.

The costs of proceedings in lunacy are in the discretion of the judge, who may order them to be paid by the lunatic, or out of his estate, or otherwise (*i*).

Mortgage to raise costs.

The present Act does not expressly mention the payment of costs as one of the purposes for which money may be raised by mortgage; and an order made by the master charging a moiety of the general costs in the lunacy upon the real estate was discharged (*k*).

Where the sole property of a lunatic consisted of a life interest in a fund, over which she had a power of appointing the capital among her children or remoter issue, on the application of her son, who was the only person interested in the fund in default of appointment, to raise money for her maintenance out of the capital of the fund, it was held that the Court could not release the power, but that the order might be made without prejudice to any question which might arise in the event of a valid appointment being subsequently made (*l*).

Lunatic's interest in property not to be altered.

All the Lunacy Regulation Acts have contained provisions to the effect that the unapplied balance of moneys raised by mortgage, &c. shall retain the character of the property forming the security for the advance; and by sect. 123 (1) of the Lunacy Act, 1890 (*m*), it is enacted that—

> "The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage or other disposition under the powers of this Act which may not have been applied under such powers as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage,

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(*f*) *Re Clarke*, (1898) 1 Ch. 336.

(*g*) *Re Bloomar*, 2 De G. F. & J. 154.

(*h*) *Ibid.* And see *Singleton* v. *Hopkins*, 1 Jur. N. S. 1199.

(*i*) 53 Vict. c. 5, s. 109.

(*k*) *Re Gist*, (1904) 1 Ch. 398.

(*l*) *Re Hirst*, W. N. (1892) 177; cf. *Re A.*, (1904) 2 Ch. 328.

(*m*) 53 Vict. c. 5.

or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged or disposed of."

Where land of a lunatic is sold compulsorily, as in a partition action, the proceeds are real estate (*n*).

But on a sale of real estate by a mortgagee under his power of sale in the lifetime of the mortgagor, the surplus proceeds of sale are personal estate notwithstanding that the mortgagor becomes a lunatic before the sale and remains so until his death (*o*).

Mortgage paid off out of personalty.

Where a mortgage on the real estate of a lunatic has been paid out of the personalty, the administratrix is entitled to be recouped out of the real estate (*p*).

Mortgage kept alive.

Where a mortgage on a lunatic's land is paid off, the mortgage is kept alive, without prejudice to the question how the mortgage debt is ultimately to be borne (*q*).

Repairs and improvements.

Money of a lunatic laid out in building or re-building on a lunatic's real estate will be taken as a charge for the benefit of the personal estate; but ordinary repairs will be at the expense of the personal estate (*r*).

Improvements and permanent repairs on the estate of a lunatic tenant in tail will not be made out of his personal estate; but the amount required may be ordered to be raised by mortgage or sale of the settled estate (*s*).

Charge on realty.

Section 118 enables the judge to charge money for improvements on the property, but so that no right of sale or foreclosure be conferred by the charge (*t*); and the Court may take into consideration not only the benefit of the lunatic, but also what is fair and right as between his real and personal estate (*u*).

Allowances out of surplus income of a lunatic tenant for life have been made to the remainderman in tail, being heir and one of the next of kin, he charging the entail with the sums paid, in favour of the personal estate (*v*).

A committee to whom an allowance is made without account cannot mortgage the allowance (*x*), but the debts properly incurred by the committee in keeping up the lunatic's establish-

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(*n*) *Re Barker*, 17 Ch. D. 241, C. A.

(*o*) *Re Grange*, (1907) 2 Ch. 20, C. A.

(*p*) *Re Leeming*, 3 De G. F. & J. 43.

(*q*) *Exp. Earl Digby*, 1 J. & W. 640; *Re Melly*, 53 L. J. Ch. 248, C. A.

(*r*) *Re Harris*, Shelford on Lunacy, 2nd ed. p. 276; *Weld* v. *Tew*, Beat. 266.

(*s*) *Re Gist*, 5 Ch. D. 881, C. A. See *Re Gist*, (1904) 1 Ch. 398.

(*t*) 53 & 54 Vict. c. 5, s. 118.

(*u*) *Re Gist*, (1904) 1 Ch. 398.

(*v*) *Re Sparrow*, 20 Ch. D. 320, C. A.

(*x*) *Re Weld*, 20 Ch. D. 451, C. A.

ment will be paid out of the arrears (*y*). So where a committee paid off a charge on the lunatic's real estate, and took an assignment to a trustee for himself, and subsequently paid off the charge out of the surplus rents without any order, he was allowed the amount in passing his accounts (*z*).

By sect. 124 of the Act it is enacted that—

Power to carry orders into effect.

> "The committee of the estate, or such person as the judge approves, shall, in the name and on behalf of the lunatic, execute and do all such assurances and things for giving effect to any order under this Act as the judge directs, and every such assurance and thing shall be valid and effectual, and shall take effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order is subject."

Conveyance.

In the case of a lunatic mortgagor who was tenant in tail without issue, with the immediate reversion in fee, the land was sold, under 1 Will. IV. c. 65, for payment of his debts, and his committee was ordered to suffer a recovery on his behalf (*a*).

Covenant for payment of mortgage moneys.

ii.—Form, Contents, &c. of Mortgage.—It would seem that, where the property of a lunatic is mortgaged to pay his ancestor's debts, the Court has no power to direct or authorize the committee to enter into any covenant on behalf of the lunatic for the payment of principal or interest (*b*).

Covenants for title.

The Court may, however, authorize a committee conveying on behalf of a lunatic, to do so "as beneficial owner," thereby importing into the deed the statutory covenants for title, which, in the case of a lunatic tenant for life, on whose behalf the powers conferred by the Settled Land Acts are being exercised, must be limited by a proviso confining the covenants to the life of the lunatic (*c*).

Mortgage for term of years.

Where the estate of a lunatic tenant in tail was charged with portions, which were decreed to be raised by sale or mortgage, a disentailing deed was directed, but not further than was requisite for the security, and the mortgage was to be only for a term of years, and without a power of sale (*d*).

On a mortgage of two estates of the lunatic under the Lunacy

(*y*) *Re Weld*, 20 Ch. D. 451, C. A.

(*z*) *Newcombe* v. *Newcombe*, Drew. 358.

(*a*) *Re Brand*, 1 My. & K. 150.

(*b*) *Re Fox*, 33 Ch. D. 37, C. A.

(*c*) *Re Ray*, (1896) 1 Ch. 468, C. A.

(*d*) *Re Pares*, 2 Ch. D. 61, C. A.

Regulation Act, 1853, a proviso was inserted, declaring that one should be considered the primary security (*e*).

Mode of executing mortgage on behalf of lunatic.

The usual mode of executing a mortgage on behalf of a lunatic is for the committee to sign the name of the lunatic, "by A. B., his committee." But where a lunatic is party to a deed, the execution is valid if the committee signs and seals in his own name (*f*).

Power of sale.

It seems that orders are frequently made by the masters directing a committee or receiver to exercise on behalf of a lunatic mortgagee a power of sale contained in the mortgage (*g*), but the order will not direct him to convey (*h*).

The powers of a committee may, in the case of a person not so found, be exercised by such person as the judge or a master may direct (*i*).

Bankruptcy of lunatic.

iii.—Other Matters.—A lunatic may be made a bankrupt with the consent of the Court in Lunacy (*k*).

Where it appears to be for the benefit of a lunatic that he should be made bankrupt, the Court will give leave to the committee, in the name of the lunatic, to present a bankruptcy petition under the Bankruptcy Act, 1883, s. 4 (f) (*l*). But it would seem to be very doubtful whether a lunatic can be adjudicated bankrupt independently of the Court in Lunacy; and even assuming such adjudication to be valid, the trustee in bankruptcy taking the lunatic's property can only do so subject to the jurisdiction in lunacy (*m*).

Charging order.

Where a fund belonging to a lunatic has been paid into Court in the Chancery Division, it will not be transferred to Lunacy without first providing for the claim of a judgment creditor who has a charging order upon it (*n*).

Settled Land Acts.

The question as to the exercise of the powers conferred on tenants for life by the Settled Land Acts on behalf of lunatics will be considered in a subsequent chapter (*o*).

(*e*) *Freeman* v. *Ellis*, 1 H. & M. 758.

(*f*) *Lawrie* v. *Lees*, 7 App. Cas. 19.

(*g*) Heywood & Massey, 4th ed. 218.

(*h*) *Re Harwood*, 35 Ch. D. 470.

(*i*) Lunacy Act, 1908, s. 1.

(*k*) *Exp. Cahen*, 10 Ch. D. 183, C. A.

(*l*) *Re James*, 12 Q. B. D. 332.

(*m*) *Re Farnham*, (1895) 2 Ch. 799, C. A.

(*n*) *Re Brown*, *Llewellin* v. *Brown*, (1900) 1 Ch. 489.

(*o*) *Post*, Chap. XXII. Sect. IV.

SECTION IV.

MORTGAGE OF PROPERTY OF BANKRUPT OR CONVICT.

Chap. XX. § 4.

The question as to the avoidance of conveyances made in fraud of creditors by persons who are unable to pay their debts will be considered in a subsequent chapter (*p*).

Bankrupt's property vests in trustee.

Immediately on a debtor being adjudged bankrupt, all his property belonging to him at the date of the bankruptcy vests in the official receiver until the appointment of a trustee, and then in the trustee (*q*), whose duty it is, as soon as may be, to take possession of such property, and administer the same for the benefit of the creditors (*r*).

Power of trustee to mortgage.

The trustee may, with the permission of the committee of inspection (among other things), mortgage or pledge any part of the property of the bankrupt, for the purpose of raising money for the payment of his debts (*s*).

Mortgage by bankrupt of after-acquired property.

But with regard to property acquired by a bankrupt after his bankruptcy, he is not absolutely precluded from dealing with it. Until the trustee intervenes, all transactions by the bankrupt after his bankruptcy, with any person dealing with him *bonâ fide* and for value, are valid against the trustee (*t*), although the person dealing with the bankrupt knew of the bankruptcy, and knew that the trustee was not aware of the accruer of the property (*u*). The rule applies only to transactions for value (*v*), but the value given need not be such as will increase the bankrupt's estate (*x*).

Real estate.

This rule, however, has been held not to apply to real estate, and accordingly does not enable an undischarged bankrupt, even before the intervention of the trustee in bankruptcy, to convey real estate, acquired after the bankruptcy, to a *bonâ fide* purchaser for value so as to give a good title to such purchaser as against the trustee (*y*); and it makes no difference whether the

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(*p*) *Post*, Chap. XXXI. pp. 586 *et seq.*

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 54.

(*r*) *Ibid.* s. 50.

(*s*) *Ibid.* s. 57 (5).

(*t*) *Cohen* v. *Mitchell*, 25 Q. B. D. 262, 267; this rule does not apply as between several trustees under successive bankruptcies: *Re Clark, Exp. Beardmore*, (1894) 2 Q. B. 393, C. A.

(*u*) *Hunt* v. *Fripp*, (1898) 1 Ch. 675.

(*v*) *Re Bennett, Exp. Official Receiver*, (1907) 1 K. B. 149.

(*x*) *Re Behrend*, (1911) 1 Ch. 687.

(*y*) *Re New Land Development Assoc. and Gray*, (1892) 2 Ch. 138, C. A.;

interest is legal or equitable (*z*). But if a man takes up an undischarged bankrupt's contract to purchase real estate and pays the purchase money, receiving on completion the conveyance to the bankrupt, he will be entitled, as against the trustee in bankruptcy, to a charge upon the land to the extent of the money so paid (*a*).

Leaseholds.

The rule applies to choses in action (*b*). It also applies to leaseholds, and where two leases were granted to an undischarged bankrupt, who demised them by way of mortgage to secure an advance, and the mortgagees sold the property under their power of sale, it was held that, the trustee in bankruptcy not having intervened, the mortgage by the bankrupt was valid, and that the purchaser from the mortgagees could be forced to accept the title (*c*).

The rule also applies to after-acquired real estate which undischarged bankrupts purchase as partners for partnership purposes (*d*).

Contingent surplus of bankrupt's estate.

An undischarged bankrupt may mortgage the contingent surplus of his estate, and the mortgagee may realize the security by sale, provided he sells subject to the rights of the trustee and the creditors under the bankruptcy (*e*).

A bankrupt has a right during the pendency of the bankruptcy to the surplus assets, and can dispose of them even before they are ascertained, and charges validly created by the bankrupt upon such surplus assets will be good as against the trustee in a subsequent bankruptcy though he has not obtained his discharge under the first bankruptcy (*f*).

Chose in action.

The equitable assignee of a chose in action acquired by a bankrupt after bankruptcy must give notice of the assignment before the trustee gives notice of the bankruptcy in order to gain priority (*g*). *Secus,* where the assignment is before the bankruptcy (*h*).

London and County Contracts v. *Tallack*, W. N. (1903) 8; 51 W. R. 408.

(*z*) *Official Receiver* v. *Cooke*, (1906) 2 Ch. 661.

(*a*) *Bird* v. *Philpott*, (1900) 1 Ch. 822.

(*b*) *Re Behrend*, (1911) 1 Ch. 687.

(*c*) *Re Clayton and Barclay's Contract*, (1895) 2 Ch. 212.

(*d*) *Re Kent County Gas, &c. Co.*, (1909) 2 Ch. 195.

(*e*) *Re Evelyn, Exp. General Public Works, &c. Co.*, (1894) 2 Q. B. 302.

(*f*) *Bird* v. *Philpott*, (1900) 1 Ch. 822.

(*g*) *Re Beall, Exp. Official Receiver*, (1899) 1 Q. B. 688.

(*h*) *Re Wallis, Exp. Jenks*, (1902) 1 K. B. 719.

Convict's property.

The administrator of a convict's property appointed under the Forfeiture Act, 1870, has an absolute power to mortgage any part of the convict's property as to him shall seem fit (*i*). The mortgage must be made *bonâ fide*, but if so made it will be binding on the convict irrespective of the reasons for which it was made (*k*).

(*i*) 33 & 34 Vict. c. 23, s. 12.

(*k*) *Carr* v. *Anderson*, (1903) 2 Ch. 279, C. A.

CHAPTER XXI.

OF MORTGAGES BY TENANTS IN TAIL.

Effect of mortgage by tenant in tail.

i.—Mode of barring Estates Tail in Possession.—Sometimes, from the circumstance of the title deeds being in the custody of a tenant for life in possession who has refused to permit them to be inspected, or from other circumstances, a mortgage security has been taken from a person as tenant in fee, who, on further inquiry, or on subsequent inspection of the title deeds after the estate has fallen into possession, has proved to be tenant in tail only. A tenant in tail has the whole estate in him; and therefore his mortgage by conveyance or demise is in its inception good to the whole extent of the estate tail, and the interest purported to be conveyed or demised is not avoided by the death of the tenant in tail, but it is determinable by entry of the issue, whether the mortgage is by demise for a term of years, or in fee (*a*).

Bar of entail by fine or recovery.

An estate tail was formerly barrable by fine or by common recovery, which, if the estate was reversionary, required the concurrence of the freeholder in possession. A fine would bar the heir in tail, but not him that was in remainder or reversion; but a recovery would bar them all (*b*). A tenant in tail, having barred the estate, could pass to a mortgagee a base fee or the absolute fee simple, according as the bar was qualified or complete.

Bar of entail under 3 & 4 Will. IV. c. 74.

By the Fines and Recoveries Act (*c*), fines and common recoveries were abolished from the 31st December, 1833, and sect. 15 of the Act provides that every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, with certain exceptions, may, after that date, dispose of, for an

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(*a*) *Machell* v. *Clarke*, 2 Ld. Raym. 778; *Tyrrel* v. *Mead*, 3 Burr. 1705; *Hankey* v. *Martin*, 49 L. T. 560.

(*b*) Shep. Touchst., by Preston, 41; Freem. 310.

(*c*) 3 & 4 Will. IV. c. 74, s. 2. As to this Act, see Carson, R. P. Stat. p. 262. The corresponding Irish Act is 4 & 5 Will. IV. c. 92.

estate in fee simple, or any less estate, the lands (*d*) entailed as against all persons claiming through his estate tail, and also as against all persons whose estates are to take effect after the determination, or in defeasance (*e*), of the estate tail.

Right to bar entail cannot be excluded.

The right of an actual tenant in tail to enlarge his estate to a fee simple cannot be restricted by any attempts on the part of the settlor or testator by inserting clauses, either that he shall not exercise the right, or by purporting to defeat the estate tail in case he exercises the right (*f*).

Meaning of "actual tenant in tail."

An "actual" tenant in tail means the tenant of an estate tail which has not been barred (*g*).

What entails cannot be barred.

The statutory power of disposition is incapable of exercise by any of the following persons:—(1) women who were at the passing of the Act tenants in tail *ex provisione viri*, under 11 Hen. VII. c. 20, except with assent (*h*); (2) tenants in tail restrained by Act of Parliament (*i*); (3) tenants in tail after possibility of issue extinct (*k*); and (4) issue inheritable to an estate tail in respect of their expectant interest (*l*).

By sect. 40 of the Act it is enacted that—

Tenants in tail to make a disposition as if seised in fee, but not by will or contract.

> "Every disposition of lands under this Act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail would have made the disposition if his estate were an estate at law in fee simple absolute. Provided nevertheless, that no disposition by a tenant in tail shall be of any force, either at law or in equity, under this Act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity, under this Act, notwithstanding such disposition shall be made or evidenced by deed."

Effect of this enactment.

The effect of this proviso is to give statutory confirmation of the established rule, that the issue in tail who claim by paramount title *per formam doni*, are not bound, either at law or in equity, to carry into effect a covenant or contract by their

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(*d*) "Lands" in this Act, unless accompanied by some expression including or denoting copyhold tenure, means freehold land and hereditaments, corporeal and incorporeal. See sect. 1 of the Act.

(*e*) As to the meaning of defeasance in this section, see *Milbanke* v. *Vane*, (1893) 3 Ch. 79, C. A.

(*f*) *Dawkins* v. *Lord Penrhyn*, 4 App. Ca. 51, at p. 64.

(*g*) 3 & 4 Will. IV. c. 74, s. 1.

(*h*) 3 & 4 Will. IV. c. 74, s. 16. The Act of Hen. VII. is repealed by sect. 17, which is in its turn repealed by the stat. 37 & 38 Vict. c. 35, but without reviving the earlier Act.

(*i*) 3 & 4 Will. IV. c. 74, s. 18.

(*k*) *Ibid.*

(*l*) *Ibid.* s. 20.

ancestor to bar the estate tail, or to perfect an incomplete disentailing assurance (*m*). But such a covenant or contract is, independently of the Act, specifically enforceable against the tenant in tail himself, as will be hereafter seen (*n*).

Sect. 40 further enacts that—

Married women to make dispositions with husbands' concurrence.

> "If the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed" (*o*).

The concurrence of the husband is necessary though the married woman is entitled for her separate use, but a restraint on anticipation will not prevent her from barring the estate tail with such consent (*p*). The bankruptcy of the husband is no bar to his concurrence (*q*). It is not necessary that the acknowledgment should precede the inrolment of the deed (*r*).

Effect of Married Women's Property Act, 1882.

If, however, the woman was married after the year 1882, or if her title to the property comprised in the disposition accrued after 1882 (*s*), a disposition made by her alone, without the concurrence of her husband, and not acknowledged by her, will be effectual to bar the entail (*t*).

Execution of disposition.

A deed of disposition is not liable to be defeated by reason of its not having been executed by the releasee to uses (*u*). But if the disposition is made by way of grant unto and to the use of a person in trust for the grantor in fee, the deed must be executed by the grantee, or it will be liable to be avoided by his subsequent disclaimer (*x*).

Form of disposition.

No particular form of disposition is rendered necessary by the Act, provided that it be made by an assurance which, if made by a tenant in fee, would be sufficient to pass the fee simple absolute (*y*). A disentailing disposition made with a view to

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(*m*) *Fox* v. *Crane*, 2 Vern. 305, 306; *Att.-Gen.* v. *Day*, 1 Ves. Sen. 218; *Hinton* v. *Hinton*, 2 Ves. Sen. 631, at p. 634. See *Franks* v. *Mainwaring*, 2 Beav. 115.

(*n*) *Post*, p. 381.

(*o*) As to acknowledgments by married women, see sect. 79 of the Act. And see *ante*, p. 326.

(*p*) *Cooper* v. *Macdonald*, 7 Ch. D. 295, C. A.

(*q*) *Ibid.* at p. 298.

(*r*) *Exp. Tavener*, 7 De G. M. & G. 627.

(*s*) See the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 2, 5.

(*t*) *Re Drummond and Davies' Contract*, (1891) 1 Ch. 531.

(*u*) See *Nelson* v. *Agnew*, I. R. 6 Eq. 232.

(*x*) *Peacock* v. *Eastland*, L. R. 10 Eq. 17.

(*y*) *Ibid.*; *Nelson* v. *Agnew*, *sup.*

giving a mortgagee a charge upon the fee simple may accordingly be made either by a separate deed, or by the mortgage deed itself.

Declaration of trust.

But a mere declaration of trust is not a sufficient disposition to bar the entail under the Act (*z*).

Dispositions for limited purposes, as by way of mortgage.

The 21st section provides that the disposition by a tenant in tail under the Act, by way of mortgage, or for any other limited purpose, shall, to the extent of the estate created, be an absolute bar in equity, as well as at law, to all persons as against whom such disposition is by the Act authorized to be made, notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition may be effected, provided that if the estate created by such disposition shall be only an estate *pur autre vie,* or for years absolute or determinable, or if an interest, charge, lien or incumbrance shall be created, without a term of years absolute or determinable or any greater estate, for securing or raising the same, such disposition shall, in equity, be a bar only so far as may be necessary to give full effect to the mortgage, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition may be effected.

Effect of this enactment.

The practical effect of this clause appears to be, that in case a tenant in tail creates a charge on the estate, by way of demise for a term of years, or *pur autre vie,* or by way of mere charge without any actual estate, the issue in tail and remainderman will be entitled, subject to the charge or incumbrance so created, notwithstanding any intention declared in the deed to the contrary, as, for example, the insertion of a proviso making the estate redeemable by the mortgagor or *his heirs*. But if a tenant in tail creates any interest by way of mortgage, exceeding his own life estate, and which, in all probability, will be in fee, the issue in tail and remainderman will be bound by it both at law and in equity, although the estate be made redeemable by the mortgagor, or *the heirs of his body,* or other the persons who would have been entitled under the old limitations, in case the same had not been barred; so that in the latter case a new set of limitations by way of re-settlement will be required, unless the sole intent of the instrument be to let in the mortgage.

(*z*) *Green* v. *Paterson*, 32 Ch. D. 95, C. A.

Such intent is in every case to be collected from the terms of the particular instrument (*a*).

If the mortgage is in fee, and it is intended to re-settle the estate to the old uses, the limitations should not be introduced into the proviso for redemption, and it would seem that the new settlement should be made by a distinct deed, inasmuch as the Act declares the estate to be barred, notwithstanding any express or implied intention to the contrary in the mortgage deed (*b*); but if the mortgage be for a term of years, it is presumed the statute does not prohibit the introduction of further limitations of express uses (*c*).

Where the second tenant in tail under a settlement disentailed his interest and re-settled the estates, and subsequently the first tenant in tail in possession mortgaged the estates with a proviso that on redemption they should be reconveyed to the uses of the original settlement, it was held that, though the estate tail was barred under the Act, the proviso for redemption was valid, so as to revive the uses of the settlement subject to the re-settlement (*d*).

Bar of entail in copyholds.

By sect. 50 of the Act entails in legal copyhold estates are made barrable by surrender, and entails in equitable copyhold estates are made barrable by surrender or by deed.

Upon considering sect. 21 in connection with sect. 50, in relation to the bar of estates tail in copyholds, it may be thought that, if a legal tenant in tail of copyholds mortgage by conditional surrender, which is not followed by admittance, the estate tail will remain unaffected, if, when the money is paid off, the surrender is vacated by the entry of satisfaction; but that the estate tail would be barred if the surrender were followed by admittance (*e*).

Application of the provisions of the Act to entailed money, &c.

By sect. 71 it is provided that lands to be sold, of whatever tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all

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(*a*) *Plomley* v. *Felton*, 14 App. Ca. 61, P. C.; *Re Byron's Settlement, Williams* v. *Mitchell*, (1891) 3 Ch. 474.

(*b*) But see *Re Oxenden, inf.*

(*c*) Sug. R. P. Stats. 2nd ed. p. 199.

(*d*) *Re Oxenden*, 74 L. J. Ch. 234.

(*e*) Dav. Conv. 4th ed. Vol. II. Pt. ii. p. 39, n. (*y*).

the purposes of this Act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and, consequently, they may be disentailed if freehold or leasehold, or of any other tenure except copyhold, or if money, subject to the provisions of the Act relating to the disentailment of freeholds; if copyhold, those applicable in the case of copyholds.

Where the property disentailed consists of leasehold lands for years absolute or determinable, or of money, such lands or money shall, as to the person in whose favour or for whose benefit the disposition is made, be treated as personal estate.

Leaseholds or money are to be disposed of by an assignment by deed to be enrolled, except in the case of bankruptcy, when the disposition is to be by the commissioner (trustee), and completed by enrolment in manner directed by the Act in regard to lands not held by copy of court roll.

Payment out of Court of entailed money.

It has been decided that where money representing land sold, and which is liable under the settlement or statute under which it is sold to be laid out in other lands to be entailed, is in Court, a disentailing deed is necessary before it will be handed over to the tenant in tail (*f*).

Disposition by tenant in tail in possession.

ii.—**Bar of Reversionary Estates Tail.**—The effect of the enactments above referred to is to enable a tenant in tail in possession of settled lands freely to bar his entail, so as to give to a mortgagee an effectual charge on the fee simple.

Disposition by tenant in tail in remainder requires consent of protector.

But, as regards estates tail in remainder or reversion, in order to retain to some extent the check which the old law placed on improvident dispositions by tenants in tail, the statute makes necessary to the validity of a disposition the consent of a "protector" in the place of the concurrence of the freeholder for life in possession, which was formerly essential to a common recovery. Generally speaking, this office is vested, by virtue of the statute, in the person taking beneficially (*g*) the first estate for years determinable on a life or lives or any greater estate (not being an estate for years) prior to the estate tail under the same settlement or will, whether by force of the actual limita-

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(*f*) *Re Reynolds*, 3 Ch. D. 61.

(*g*) *Re Dudson's Contract*, 8 Ch. D. 628, C. A.

tions or by resulting use or trust, and an estate by the curtesy is a prior estate within the meaning of this enactment (*h*). When there are several owners of the prior estate, each of them is to be the sole protector as to his undivided share (*i*).

Married woman protector.

Where a married woman is entitled to a prior estate for her separate use she alone is the protector; otherwise, she and her husband together are the protectors.

Lessees, &c.

Lessees at a rent (*k*), dowresses (*l*), and bare trustees (*m*) (unless taking under a settlement made before the passing of the Act), are excluded from the office of protector.

Power for settlor to appoint protector.

Any settlor may, by the settlement, appoint any number of persons, not exceeding three, to be protectors of the settlement, and may give to any person or persons, not exceeding three, a power of appointing by deed a protector in the place of a protector dying or relinquishing the office (*n*). But no deed of appointment under such a power, or of relinquishment of the office, is to be operative unless enrolled within six calendar months after its execution. In case of death of one or more of several protectors appointed by the settlor or under a power, the survivors or survivor will be the protector (*o*). If they all die, the office will revert to the first owner of a prior life estate (*p*).

Lunatic protector, &c.

In case of the lunacy of a protector, the Lord Chancellor, or other the person or persons entrusted with the care of lunatics (*q*), and in cases of treason or felony, or in cases of infancy, or if it be uncertain whether the protector be living or dead, the Court of Chancery is to be the protector (*r*).

Consent of protector.

A protector cannot be controlled in the exercise of his discretion as to giving or withholding his consent (*s*). It would seem that a contract under seal by a protector to give his consent would be a sufficient consent under the Act, or might be specifically enforced (*t*). A consent once given is irrevocable (*u*).

Mode of giving consent.

The consent may be given by the disentailing assurance itself, or by a distinct deed to be executed either on or at any time before the day on which the assurance is made, otherwise

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(*h*) 3 & 4 Will. IV. c. 74, s. 22.

(*i*) *Ibid.* s. 23. See *Tufnell* v. *Borrell*, L. R. 20 Eq. 194.

(*k*) 3 & 4 Will. IV. c. 74, s. 26.

(*l*) *Ibid.* s. 27.

(*m*) *Ibid.* s. 31.

(*n*) *Ibid.* s. 32.

(*o*) *Bell* v. *Holtby*, L. R. 15 Eq. 178.

(*p*) *Clarke* v. *Chamberlin*, 16 Ch. D. 176.

(*q*) 3 & 4 Will. IV. c. 74, s. 33.

(*r*) See *ibid.* and *Re Wainwright*, 1 Phil. 258.

(*s*) See *Bankes* v. *Le Despencer*, 11 Sim. 527.

(*t*) *Bankes* v. *Small*, 36 Ch. D. 716, at p. 724, C. A.

(*u*) 3 & 4 Will. IV. c. 74, s. 44.

the consent will be void (x). And the consent, if given by a distinct deed, is to be considered absolute and unqualified, unless expressly confined by the protector to a particular disentailing assurance (y).

As to copyholds.

In the case of a legal entail of copyholds, if the consent of the protector is given by deed, the deed must be executed by the protector either at or before the time of making the surrender, and produced to the lord of the manor or steward, otherwise the consent will be void. The consent, if not given by deed, must be given by the protector to the person taking the surrender (z).

Equitable estate tail in copyholds.

Where the estate tail in copyholds is equitable, if the protector gives his consent by a distinct deed, the consent will be void unless the deed is executed by the protector either on or at any time before the day on which the deed of disposition is executed by the equitable tenant in tail; and the deed of consent must be entered on the court rolls either at or before the entry of the disentailing deed (a).

Disposition without consent of protector creates base fee.

Where there is a protector, his consent to the disposition by the tenant in tail is necessary, whether the settled lands are freeholds or copyholds (b); otherwise, a disentailing assurance executed by the tenant in tail, though in all other respects in conformity with the Act, will be inoperative to confer more than a base fee, that is to say, an estate barring the issue in tail, but not those entitled in remainder (c).

Enlargement of base fee by deed:

iii.—**Enlargement of Base Fee.**—A tenant in tail who has created a base fee, and notwithstanding that he has parted with it, may by deed enlarge that base fee into a fee simple absolute after the death of the protector (d), or, during the protectorship, with the protector's consent (e); and where the base fee becomes united with the immediate remainder or reversion in fee in the same lands, the base fee instead of being merged into the greater estate will, *ipso facto*, become enlarged (f).

—by union with remainder in fee;

—by possession;

By sect. 6 of the Real Property Limitation Act, 1874 (g), where a tenant in tail has created a base fee, and any person by

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(x) 3 & 4 Will. IV. c. 74, s. 42.

(y) *Ibid.* s. 43.

(z) *Ibid.* s. 52.

(a) *Ibid.* s. 51.

(b) See *ibid.* s. 50.

(c) *Ibid.* s. 34.

(d) *Ibid.* s. 38; *Bankes* v. *Small*, 36 C. D. 716, C. A.

(e) *Ibid.* ss. 35, 38.

(f) *Ibid.* s. 39.

(g) 37 & 38 Vict. c. 57. See *Perry* v. *Allen*, 7 De G. M. & G. 426; *Morgan* v. *Morgan*, L. R. 10 Eq. 99.

virtue of such assurance enters into and continues in possession or receipt of the rents and profits of the land, the remainders will be effectually barred at the end of twelve years from the time when the tenant in tail or his issue could, without the consent of any protector, have barred the remainders under the statute 3 & 4 Will. IV. c. 74. Where a conveyance to a purchaser comprised a base fee, and also a prior life estate, it was held that, until the determination of the life estate, time did not begin to run in favour of the purchaser's possession under the conveyance, so as to bar the remainders over (*h*).

—by sale in bankruptcy.

And where, for want of the consent of the protector, the disposition by the trustee in bankruptcy under this Act has only the effect of creating a base fee, or the base fee only of the bankrupt is sold under the Bankruptcy Act, such base fee is made *ipso facto* to enlarge into a fee simple upon there ceasing to be a protector (*i*).

Conveyance of fee under Settled Land Acts.

A tenant in tail after possibility of issue extinct, and a person entitled to a base fee, can exercise the statutory powers of a tenant for life so as to convey the fee simple of the lands by way of mortgage, for any purpose authorized by the Settled Land Acts (*k*).

Security let in by subsequent fine or recovery.

If, prior to 3 & 4 Will. IV. c. 74, a tenant in tail, whether in possession or reversion, made a mortgage security without fine or recovery, and afterwards levied a fine or suffered a common recovery, he let in the assurance, even against a purchaser or mortgagee without notice (*l*).

Where judgment had been obtained and execution had been issued against a tenant in tail in possession, so as in effect, by virtue of the statute 1 & 2 Vict. c. 110, s. 13, to give to the creditor a charge similar to a mortgage of the base fee, the debtor was ordered, in a suit to realize the charge, to execute a disentailing deed, so as to wholly bar the entail and give full effect to the charge created by the judgment (*m*).

Voidable estates con-

In respect of estates voidable through the defective assurance

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(*h*) *Mills* v. *Capel*, L. R. 20 Eq. 692.

(*i*) Sects. 60, 61. By the B. A. 1883, s. 56 (5), the provisions of the 3 & 4 Will. IV. c. 74, on this subject are extended to proceedings in bankruptcy under that Act.

(*k*) 45 & 46 Vict. c. 38, s. 18; 53 & 54 Vict. c. 69, s. 11. And see *Re Morshead's Settled Estates*, W. N. (1893) 180. See *post*, p. 393.

(*l*) *Stapilton* v. *Stapilton*, 1 Atk. 8; *Towle* v. *Rand*, 2 Bro. C. C. 650; *Lloyd* v. *Lloyd*, 4 Dr. & War. 354; *Beck* v. *Walsh*, 1 Wils. 276.

(*m*) *Lewis* v. *Duncombe*, 20 Beav. 398.

of a tenant in tail, sect. 38 of the Act has mainly followed the common law, by enacting that a voidable estate, created in favour of a purchaser (or mortgagee) for a valuable consideration, shall (so far as a subsequent assurance by the tenant in tail can operate under the provisions of the Act) be confirmed by such assurance. But the statute has altered the common law, by introducing an exception in favour of a purchaser for valuable consideration not having express notice of the first assurance, and consequently such purchaser, although he may have notice by *implication* of the defective assurance, yet, if he has not *express* notice, will not be bound by it (*n*).

firmed by subsequent disposition.

Defective assurance by bankrupt tenant in tail.

By sect. 62 of the Act it is enacted, that a voidable estate created by a tenant in tail (which term includes the person entitled to a base fee, and who would have been actual tenant in tail if the base fee had not been created), becoming bankrupt, in favour of a purchaser for a valuable consideration, shall be confirmed by the disposition of the trustee in bankruptcy (so far as the assurance can operate under the provisions of the Act), unless such disposition shall be made to a purchaser for a valuable consideration without express notice. And by the Act the trustee is directed to convey to purchasers the estates of bankrupt tenants in tail (*o*), and the trustee is authorized *ad interim* to receive rents and enforce covenants (*p*).

Death of bankrupt.

And the like effect is given to the disposition by the trustee after the bankrupt's decease, as if he had been alive in the several cases mentioned in the clause, which seem to include all cases except the following: where at the time of the bankrupt's decease there is no protector; or where at the time of disposition there is *issue* who would be inheritable under the entail, and there is at the same time either no protector, or a protector consenting or not consenting; or where the bankrupt was tenant in tail entitled to a base fee, and there is at the time of disposition issue who would be inheritable under the entail, and a non-consenting protector (*q*). In the last case the base fee would vest in the trustee by force of his appointment, under the Bankruptcy Act, 1883, ss. 20 and 21, as it formerly passed under the general bargain and sale.

Powers of trustee.

The bargain and sale of commissioners is now dispensed with

(*n*) Carson, 293, 294.

(*o*) 3 & 4 Will. IV. c. 74, ss. 56—59.

(*p*) *Ibid.* s. 67.

(*q*) *Ibid.* s. 65.

as to copyholds, a power of appointment of copyholds being vested in the trustees of the bankrupt's estate (*r*), and as to estates tail, the trustee in bankruptcy has the same powers as the tenant in tail (*s*).

The sects. 56 to 73, both inclusive, of 3 & 4 Will. IV. c. 74, are still in force, and were incorporated into the Bankruptcy Acts, 1849 and 1869, and are incorporated into the Bankruptcy Act, 1883, which gives to the trustee in bankruptcy power to deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with it. And it enacts that the sections above referred to shall extend and apply to proceedings in bankruptcy, under the Act of 1883, as if those sections were then re-enacted and made applicable in terms to such proceedings (*t*).

Effect of confirmation of defective assurance.

In the case of a defective mortgage in 1841 by a tenant in tail in remainder, who, after his bankruptcy and the death of the tenant for life, barred the entail, the confirmation by the commissioners in bankruptcy vested the fee simple in the mortgagee (*u*).

Married woman.

A married woman, married since 1882, may enlarge a base fee created by her before her marriage without the concurrence of her husband or acknowledgment (*x*).

Lunatic.

A base fee has been enlarged where it was for the benefit of the lunatic (*y*).

Issue not bound

iv.—Covenants to perfect defective Assurances by Tenants in Tail.—It was decided under the old law that if the tenant in tail died before he had performed the necessary acts for barring the entail, the issue claiming *per formam doni* would not be bound to perfect the title of the purchaser or mortgagee (*z*).

It has been seen that the Fines and Recoveries Act (*a*) draws a distinction between dispositions by tenants in tail resting in contract, which are not to be of any force under the Act, and

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(*r*) B. A. 1883, s. 50 (4).

(*s*) *Ibid.* s. 56 (5).

(*t*) B. A. 1883, s. 56 (5).

(*u*) *Hankey* v. *Martin*, 49 L. T. 560.

(*x*) *Re Drummond and Davie*, (1891) 1 Ch. 524.

(*y*) *Re Sefton*, (1898) 2 Ch. 378, C. A.

(*z*) *Stapilton* v. *Stapilton*, 1 Atk. 8. See also Lit. ss. 46, 595, 712. And see cases cited *ante*, p. 372, note (*m*).

(*a*) 3 & 4 Will. IV. c. 74, s. 15, *ante*, p. 370.

interests actually created under the Act. And by sect. 47 of the Act it is enacted that—

Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in Courts of law would not be effectual.

> "In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof, the jurisdiction of Courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this Act to tenants in tail, or of the powers of consent given by this Act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any manner to any act or deed by a tenant in tail or protector of a settlement which in a Court of law would not be an effectual disposition or consent under this Act; and that no disposition of lands under this Act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this Act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this Act in a Court of law."

Power of Court to decree specific performance of covenant to execute disentailing deed.

The effect of the 47th section is, that the Court cannot compel the issue in tail or the remainderman to carry out a contract by a tenant in tail to execute a disentailing assurance, or to remedy any defects in such an assurance (*b*). But there is nothing in the Act to affect contracts as such, and accordingly, though a covenant for further assurance generally, or even a covenant to execute a disentailing assurance, will not operate to bind the issue in tail or the remainderman under the Act, yet, as against the tenant in tail himself, non-fulfilment of the covenant may support an action for damages, or for specific performance (*c*).

Effect of covenant for further assurance.

In such cases the question is whether, upon the construction of the covenant, it was the intention of the parties, expressly or by necessary implication, to bind the tenant in tail to do all in his power to give to his mortgagee an effectual charge on the fee simple. In *Davis* v. *Tollemache* (*d*), the covenant was for further assurance generally in the usual form, and the Court refused, in a suit for specific performance, to compel the tenant

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(*b*) *Bankes* v. *Small*, 36 Ch. D. 716, C. A. See *Mills* v. *Fox*, 37 Ch. D. 162; *Re Ottley*, (1910) 1 Ir. R. 1.

(*c*) *Bankes* v. *Small*, 36 Ch. D. 716. See *Petre* v. *Duncombe*, 7 Ha. 24.

(*d*) 2 Jur. N. S. 1181.

in tail, who had become bankrupt, to exercise the power of disposition reserved to him by sect. 64 of the Act by enlarging the estate conveyed by the mortgage. In this case the mortgage was not inrolled, but this point does not appear material, as the covenant, *quâ* contract, did not depend for its meaning or effect upon the provisions of the Act.

Express covenant to execute disentailing assurance.

In a recent case in the Court of Appeal, however (*e*), where a tenant in tail in remainder barred his estate tail without the consent of the protector, and conveyed the base fee so created to a purchaser, covenanting not only for further assurance generally, but also to execute every such disentailing or other assurance as should be reasonably required, the vendor was directed, by way of specific performance of that covenant, to execute a disentailing deed so as to enlarge into a fee simple the base fee which was already vested in the purchaser.

Where a tenant in tail of copyholds deposited his title deeds with an agreement to make a formal surrender to secure a loan, a remainderman who joined in the deposit was held bound to carry out the agreement (*f*).

Where the Court has power to compel the mortgagor tenant in tail to perfect the title, it will not point out what title the mortgagor shall make ; it will decree him to make such title to the mortgagee as he is capable of doing (*g*).

Rectification of deed.

Sect. 47 of the Act does not preclude the Court from rectifying the deed of disposition itself, on the ground of mistake or fraud, if it is shown that the instrument as executed and inrolled does not carry out the intention of the parties (*h*).

But it does preclude the Court from transforming a deed which, according to its legal construction, is ineffective to bar the entail, into a valid disentailing assurance (*i*).

Nature of interest misunderstood.

Similarly, where a disentailing disposition, duly executed and inrolled, sufficiently expressed the intention to convey the fee simple in the entailed property, and clearly passed the interest of all conveying parties, the security was upheld, though the nature of the interests of the conveying parties was misunderstood by them and misrecited in the deed (*k*).

To an action for specific performance of a covenant by a

(*e*) *Bankes* v. *Small, sup.*

(*f*) *Bryce* v. *Bury*, 2 Drew. 11.

(*g*) *Sutton* v. *Stone*, 2 Atk. 100.

(*h*) *Hall-Dare* v. *Hall-Dare*, 31 Ch. D. 251, C. A.

(*i*) *Re Ottley's Estate*, (1910) 1 Ir. R. 1.

(*k*) *Evans* v. *Jones*, Kay, 29.

tenant in tail in remainder to disentail the estate after the death of the tenant for life, judgment creditors of the tenant in tail, whose debts had been made charges on his estate under the stat. 1 & 2 Vict. c. 110, were held not to be necessary parties (*l*).

v.—Inrolment of Dispositions.—The Act further renders inoperative every assurance of freeholds effected under the Act (except certain leases), though otherwise effectual for disposing of the estate, unless it is inrolled in Chancery (now the Enrolment Department of the Central Office) within six calendar months from the date of execution (*m*).

Of consent of protector.

Every consent of a protector to a disentailing assurance, if given by a distinct deed, is void unless such deed is inrolled in like manner, either at or before the time when the assurance is inrolled (*n*).

Dispensation with inrolment as to copyholds.

In the case of copyholds, where a disposition by a tenant in tail is effected by surrender or by deed, the surrender, or the memorandum thereof, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent, requires no inrolment otherwise than by entry on the court rolls (*o*). A disentailing assurance by a tenant in tail of copyholds, if not entered on the court rolls of the manor within six months after execution, is void (*p*). An indorsement by the steward that the deed was produced to him is not a sufficient inrolment (*q*). If the protector consents by deed, such deed must be executed by him and produced to the lord or his steward at or before the time when the surrender is made by which the disposition is effected, or otherwise the consent will be void (*r*). The consent, if not given by deed, must be given by the protector to the person taking the surrender, and provision is made for evidencing the fact of the consent having been given, (1) out of Court, or (2) in Court (*s*).

A disentailing assurance may be inrolled within six months after execution, notwithstanding the death of the tenant in tail who executed it (*t*).

(*l*) *Petre* v. *Duncombe*, 7 Ha. 24.

(*m*) 3 & 4 Will. IV. c. 74, s. 41.

(*n*) *Ibid.* s. 46.

(*o*) *Ibid.* s. 54.

(*p*) *Honywood* v. *Foster*, 30 Beav. 1; *Gibbons* v. *Snape*, 1 De G. J. & S. 621; *Green* v. *Paterson*, 32 Ch. D. 95, C. A.

(*q*) *Boyd* v. *Pawle*, 14 W. R. 1009.

(*r*) 3 & 4 Will. IV. c. 74, s. 51.

(*s*) *Ibid.* s. 52.

(*t*) *Re Piers*, 14 Ir. Ch. R. 452.

Relation back of inrolled deeds.

Every inrolled deed operates and takes effect as from the date of its execution, with the exception that every such deed shall be void as against a purchaser for valuable consideration claiming under a deed, although subsequently executed, if such subsequent deed shall be the first inrolled (*u*).

Inrolment in case of bankruptcy.

Sect. 59 of the Act contains provisions as to the inrolment of deeds of disposition of freeholds, and entry on court rolls of deeds of disposition of copyholds, and of deeds of consent, in the case of the bankruptcy of tenants in tail.

Precautions to be observed by mortgagee as to inrolment.

Having regard to these provisions, it is obvious that it is of the utmost importance to a mortgagee of disentailed lands to see that his security is rendered effectual as against subsequent mortgagees of the same lands by an immediate inrolment of his assurance. Indeed, he ought not to part with his money until the assurance has been inrolled, nor until he has ascertained that up to the time of actual inrolment no other assurance of the mortgaged lands by the tenant in tail has been inrolled. These precautions will prevent the mortgagee's security from being prejudiced by any dealing with the property of which he has not express notice; for none of the provisions in the Act respecting voidable estates have the effect of confirming them against purchasers for value without notice. As the inrolment of a disentailing assurance relates back to its execution, it follows that intermediate conveyances by the persons deriving title under it will have their full effect.

(*u*) 3 & 4 Will. IV. c. 74, s. 74.

CHAPTER XXII.

MORTGAGES BY LIMITED OWNERS UNDER POWERS.

SECTION I.

MORTGAGES UNDER EXPRESS POWERS.

Usual form of powers of mortgaging.

i.—Express Powers of Mortgaging in Settlements and Wills. —The express powers of mortgaging which, before the passing of the Settled Land Act, 1882 (*a*), were not unfrequently inserted in strict settlements of real estate by deed or will were, according to the general practice, given to the trustees of the settlement, not to the tenant for life; but, usually, such powers were made exerciseable by the direction or with the consent of the tenant for life, if of full age, and then only for certain specified purposes, such as providing money for raising portions, renewal of leases, enfranchisement of copyholds, equality of exchange, or paying off incumbrances. Powers of mortgaging are even now sometimes inserted in such settlements, where money is likely to be required for purposes other than those for which tenants for life are by statute empowered to raise money by mortgage of the settled lands (*b*); but the consent of the tenant for life is now necessary to the exercise by the trustees of any such power (*c*). It is conceived, however, that no such consent would be necessary to the exercise of a power by trustees for raising charges by mortgage or sale, since the trustees would have a title paramount to the tenant for life (*d*).

Power of leasing, when includes

If a tenant for life with power to lease for such number of years and upon such terms as he shall "think fit" (*e*), or "think

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(*a*) 45 & 46 Vict. c. 38.

(*b*) See *ibid.* s. 18, and the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11.

(*c*) 45 & 46 Vict. c. 38, ss. 18, 56 (2). See as to several tenants for life, 47 & 48 Vict. c. 18, s. 6.

(*d*) See Wolst. (8th ed.) 387; and cf. *Re Carne's Settled Estates*, (1899) 1 Ch. 324; but see *Osborne to Brights*, (1902) 1 Ch. 335.

(*e*) *Sheehy* v. *Lord Muskerry*, 1 H. L. C. 576; *Talbot* v. *Tipper*, Skin. 427.

power of mortgaging.

reasonable and proper" (*f*), mortgages by demise for ninety-nine years, at a peppercorn rent, such mortgage is a charge on the inheritance; the lease is not invalid on the ground of a supposed or real hardship on the remainderman, as the power is left to the discretion of the tenant for life, who may execute it for his own benefit.

Mortgage of renewal fines.

A tenant for life, with power to renew leases for lives on the usual rents, and to take fines, may mortgage his interest, including the fines, for his own benefit (*g*).

Exercise of power by tenant for life who has parted with his interest.

ii.—**Exercise of Power after Alienation.**—The power of a tenant for life to sell or mortgage (*h*), or to consent to or direct a sale or mortgage (*i*), expressly limited to him under a settlement, will not, as a rule, be destroyed by the alienation or charging by him of his life interest under the settlement. And it makes no difference whether the alienation of the life interest is by the act of the tenant for life or by operation of law, but in such case the power cannot be exercised except with the consent of the trustee in bankruptcy (*k*).

If, however, it clearly appears from the language of the deed whereby the power is created that it is intended to be exerciseable by the tenant for life only so long as he retains possession of his life interest, or, *à fortiori*, if the power contains an express statement to that effect, a charge or alienation by him of his interest under the settlement will destroy the power (*l*).

The above proposition has been recognized, on the ground that "he who gives the power may give it with what qualifications he pleases" (*m*).

Where the question is, whether a power to sell or mortgage is destroyed or not by an alienation by the tenant for life of his life interest, the fact that in such alienation the power was expressly reserved is wholly immaterial (*n*).

Whether concurrence of

Where the tenant for life has parted with his life interest, it

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(*f*) *Mostyn* v. *Lancaster*, 23 Ch. D. 583, C. A.

(*g*) *Simpson* v. *Bathurst*, L. R. 5 Ch. 193.

(*h*) *Jones* v. *Winwood*, 3 M. & W. 653; *S. C.*, 10 Sim. 150.

(*i*) *Holdsworth* v. *Goose*, 29 Beav. 111; *Eisdell* v. *Hammersley*, 31 Beav. 255; *Warburton* v. *Farn*, 16 Sim. 625; *Alexander* v. *Mills*, L. R. 6 Ch. 124.

(*k*) *Re Cooper*, *Cooper* v. *Slight*, 27 Ch. D. 565; *Re Bedingfield and Herring's Contract*, (1893) 2 Ch. 332.

(*l*) *Haswell* v. *Haswell*, 2 De G. F. & J. 456; *Bullock* v. *Thorne*, 1 Moo. 615. And see *Alexander* v. *Mills*, *sup.*, at p. 133.

(*m*) Sug. Powers, 8th ed. 58, and App. at p. 895.

(*n*) *Alexander* v. *Mills*, *sup.*

alienee is necessary.

does not appear to be necessary, in a subsequent exercise of his power by the tenant for life, that the concurrence of the alienee of the life interest should be obtained, provided the rights of the alienee are not prejudiced (*o*).

But, upon the principle that a man may not derogate from his own grant, an exercise of a power by a tenant for life, who has parted with or charged his life interest, will be valid only so far as it does not prejudicially affect the estate of the alienee (*p*).

If the exercise of the power would interfere with the rights of the alienee of the life interest, the power is not extinguished, but merely suspended, and may be exercised with the consent and concurrence of the alienee, who may re-convey to the tenant for life or join in the conveyance to the subsequent purchaser or mortgagee (*q*).

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Section II.

Mortgages by Limited Owners, etc. under Statutory Powers for Special Purposes.

Statutory powers of mortgage.

i.—Generally.—Numerous statutes, of which the principal are briefly noticed in the following pages, have been from time to time passed conferring powers of mortgaging settled property on limited owners, and on behalf of persons under disability for specified purposes; these statutes generally contain particular forms of mortgage enforced or recommended by authority of Parliament; but if a statutory mortgage is contemplated, reference must be made to the particular Act in question for the requisite information (*r*).

Liability of mortgagees to see to application of moneys advanced.

Questions on the liability of a purchaser or mortgagee under an Act of Parliament to see to the application of his money do not often arise, as a proper clause of indemnity is always inserted

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(*o*) *Hardaker* v. *Moorhouse*, 26 Ch. D. 417, at pp. 422, 424.

(*p*) *West* v. *Berney*, 1 R. & My. 431; *Noel* v. *Lord Henley*, M'Cl. & Y. 302; *Stewart* v. *Marquis of Donegal*, 2 J. & Lat. 636; *Goodright* v. *Cator*, Doug. 477; *Alexander* v. *Mills*, L. R. 6 Ch. 124.

(*q*) *Walmesley* v. *Butterworth*, 4 L. J. Ch. 253; *Alexander* v. *Mills*, L. R. 6 Ch. 124; *Re Bedingfield and Herring's Contract*, (1893) 2 Ch. 332.

(*r*) As to land charges under various statutes made otherwise than by way of mortgage, see *post*, Chap. LIX. s. 3.

in well-drawn Acts. But, in the absence of any such clause, it seems that a purchaser or mortgagee will be bound to see that the money he advances is applied for the purposes of the Act, notwithstanding that he pays it into the hand appointed by the Act to receive it (*s*).

Guardians, tenants for life, &c. may charge allotments with expenses.

ii.—Mortgages under Inclosure Acts.—By the General Inclosure Act (*t*), husbands, guardians, trustees, committees, or attorneys of any owners of allotments and exchanged lands, being under coverture, minors, lunatics, beyond the seas, or under any other disability, and any of such owners, being tenants in tail, or for life or lives, or years determinable on a life or lives, or any other contingency, or otherwise interested, as therein mentioned (except rectors or vicars), may charge such allotments or exchanged lands with such sums, not exceeding 5*l*. per acre, as the Inclosure Commissioners (*u*) shall, by their award, adjudge necessary to defray their shares of the charges and expenses incident to the obtaining any Inclosure Act and carrying the same into execution, and of charging the lands, and may mortgage or otherwise subject the lands to be charged to the person advancing the money for any term of years; or in case any person in possession, liable to a share of the expenses, shall choose to advance the money, then the commissioners may, by deed attested by two witnesses, mortgage or otherwise subject the lands to such person paying the same for any term of years for the payment of such sum, with interest to commence on the termination of his right in the premises; and such deed is to contain a covenant to pay and keep down the interest, so that no person shall be liable to pay arrears of interest other than for six calendar months preceding the time when his title to possession shall have commenced.

Power to mortgage allotments.

These provisions are in substance re-enacted and extended by sect. 133 of the General Inclosure Act, 1845 (*x*), which provides that tenants for life or in tail, or for any other estate of freehold or inheritance, and their husbands, guardians, &c., in case of disability or incapacity, and trustees, or feoffees for charitable,

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(*s*) *Cotterell* v. *Hampson*, 2 Vern. 5.

(*t*) 41 Geo. III. c. 109, s. 30. Similar powers of mortgaging were commonly inserted in the particular Inclosure Acts passed previously to the general Inclosure Act.

(*u*) Now the Board of Agriculture. See 52 & 53 Vict. c. 30.

(*x*) 8 & 9 Vict. c. 118.

parochial, or other uses, or the majority of them, with the consent of the commissioners (*y*), and incumbents, with the consent in writing of the bishop of the diocese, and the patron of the benefice, may charge their allotments with any money not exceeding 5*l.* per acre towards their respective proportions of the inclosure expenses, and for securing the repayment of such money, with interest, may mortgage or demise their allotments; provided every such mortgage or demise, by or on behalf of a person entitled for life, shall contain a covenant to keep down the interest during his life, so that no subsequent owner shall be liable to more than six months' arrears accrued previous to the time when his title shall accrue or commence; and, in the case of a benefice, the incumbent is to keep down the interest, and also to repay, in reduction of the principal, one-thirtieth part of the money every year, until the whole be repaid; and every such mortgage is to be valid in law for the purposes of the Act, and every such mortgagee and his assigns is to have the like remedies in case of non-payment as are usual in the case of mortgages of a like nature.

Money raised for expenses to be paid to commissioners.

By the statute 11 & 12 Vict. c. 99, s. 8, it is provided that on mortgage of allotments the money shall be paid to and applied by the commissioners, and their receipt shall be a sufficient discharge for the money.

Compensation for equality on partition.

By the statute 20 & 21 Vict. c. 31, ss. 7, 8, on an exchange or partition, the disproportion in value of allotments may be compensated by a rentcharge, provided the deficiency in value does not exceed one-eighth of the actual value of the land.

Concurrence of commissioners.

The concurrence of the commissioners in a mortgage by a tenant for life or in tail is not required by the Act. It is sufficient that they have certified the amount to be raised; but in order to obtain from them a recognition of the fact of their having given their certificate, it is desirable that they should join in the mortgage.

Advance by tenant for life for expenses.

If a tenant for life advances money for expenses under an Inclosure Act, and dies without having taken a mortgage on the estate, his executors will be entitled to have the charge raised (*z*).

(*y*) Now the Board of Agriculture. See 52 & 53 Vict. c. 30.

(*z*) *Drinkwater* v. *Coombe*, 2 S. & St. 340.

Mortgage, &c. for purpose of redemption.

iii.—Mortgages for Redemption of Land Tax.—The Land Tax Redemption Act (*a*) provides that, for the purpose of redeeming land tax on lands belonging to individuals, the persons in possession, but not having the absolute estate, and persons beneficially entitled to the rents and profits (except tenants at rack rent and Crown tenants), may sell part of such lands or may mortgage the same, or grant any rentcharge to the amount of the land tax: sect. 51. Tenants in tail in England may convey by deed enrolled: sect. 52. And committees, guardians, executors, and administrators or trustees may sell or mortgage on behalf of persons under disability: sect. 53. Such sales or mortgages of estates in England are to be made under the authority of two of the commissioners for the time being acting in the execution of the Act, to whom one month's previous notice of the intended sale or mortgage must be given, with a schedule stating the interest of the party desirous of selling or mortgaging, the name of the remainderman, and the particulars of incumbrances affecting the property: sects. 54, 55. Prior mortgages are not to be affected by mortgages under this Act, except as to interest; and they are to be entitled according to their priorities to advance the money required for the redemption of the land tax in preference to all others: sect. 114. All mortgages under this Act are to be enrolled within six months if the consideration exceeds 200*l.*: sect. 19. Proof of the execution of the mortgage deed by the commissioners is to be sufficient evidence that all requirements of the Act were duly complied with: sect. 120.

Unopened mines.

Unopened seams of coal under land belonging to the same owner, in respect of which the land tax is redeemed, are included in the redemption, unless the surface only was intended to be redeemed (*b*).

Highway.

Redemption of the land tax exonerates the land *a centro usque ad cœlum,* and exonerates an adjoining highway *ad medium filum* (*c*).

Statute of Limitations.

Where a person having an interest other than an estate of inheritance redeems the land tax under sect. 123, he has a charge upon the land, which he can enforce in the usual way, but his claim to recover will be barred unless he brings his

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(*a*) 42 Geo. III. c. 116, s. 51.

(*b*) *Newton & Co.* v. *Hall,* (1907) 2 K. B. 446.

(*c*) *Central London Railway* v. *Commissioners,* (1911) 2 Ch. 467, C. A.

action within the time limited by the Real Property Limitation Act, 1874 (*d*).

Redemption by tenant for life.

The owner of the land has a right to redeem the charge. So where the tenant for life has redeemed the land tax, the remainderman can compel his representatives to receive the consideration money and clear the estate (*e*).

Leaseholds.

Where leaseholds are settled after redemption of the land tax, the charge of the land tax does not pass, but remains in the settlor (*f*).

Redemption by landlord.

Where a lessee agreed to pay the land tax, and it had been redeemed by the landlord, the lessee was still liable to pay the amount (*g*).

Surplus sale moneys.

The surplus sale moneys of land sold for redemption of land tax may be applied in discharge of incumbrances (*h*), but not in repairs or improvements (*i*).

Power to raise money for enfranchisement.

iv.—Mortgages for Enfranchisement of Copyholds.—By the Copyhold Act, 1858 (*k*), lords and tenants of copyholds were empowered, with the consent of the commissioners, to charge manors and enfranchised lands respectively with the consideration or compensation for commutation or enfranchisement, and the expenses incident to the same; every such charge is to be made by a certificate of charge under the seal of the commissioners, and to be transferable by endorsement. The forms of certificate and transfer are given in sects. 36 and 37. By sect. 33 of this Act, it was provided that any such charge under that Act should be a first charge, having priority over all incumbrances affecting the land, except tithe commutation rent-charges, and statutory drainage charges.

Priority of charge.

By sects. 23 and 24 of the Copyhold Act, 1887 (*l*), it was enacted as follows:—

> "It shall be lawful for the owner of any land enfranchised under the Copyhold Acts, although his estate may be only a limited estate, to charge the land enfranchised with the compensation money paid for such enfranchisement, and also with the expenses attending such enfranchisement, or with any part thereof respec-

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(*d*) *Skene* v. *Cook*, (1902) 1 K. B. 682, C. A.

(*e*) *Cousens* v. *Harris*, 12 Q. B. 726.

(*f*) *Neame* v. *Moorsom*, L. R. 3 Eq. 91.

(*g*) *Murray* v. *Parker*, 19 Beav. 305.

(*h*) 42 Geo. III. c. 116, s. 100.

(*i*) *Re Nether Stowey Vicarage*, L. R. 17 Eq. 156.

(*k*) 21 & 22 Vict. c. 94, ss. 21—37.

(*l*) 50 & 51 Vict. c. 73.

tively, with interest thereon not exceeding five pounds per centum per annum, or by way of terminable annuity calculated on the same basis. Any and every such charge may be by deed by way of mortgage with, under and subject to the provisions of the Conveyancing and Law of Property Act, 1881 (*m*), and shall be a first charge on the land, and shall have such priority as by the thirty-third section of the Copyhold Act, 1858 (*n*), is assigned to the charges there expressed to be first charges; and any moneys already invested or previously secured or charged on such land may be continued on the security of the same, notwithstanding the imposition of the said charges under the Copyhold Acts.

"Any expenses paid by a lord in proceedings under the Copyhold Acts may be charged either on lands settled to the same uses as the manor or on rent-charges arising out of other enfranchisements within the manor, and every such charge shall be by deed by way of mortgage with, under and subject to the provisions of the Conveyancing and Law of Property Act, 1881" (*o*).

Copyhold Act, 1894.

All the earlier Copyhold Acts are repealed by the Copyhold Act, 1894 (*p*), but so as not to affect any deeds, instruments, charges, &c. having effect under any enactment repealed by this Act.

The Act of 1894 contains the following provisions with regard to raising money for enfranchisement:—

Charge for consideration money, and for expenses of tenant.

Sect. 36.—"(1) Where an enfranchisement is effected under this Act, the tenant may charge the land enfranchised with all money paid by him as the compensation or consideration for the enfranchisement, and with his expenses of the enfranchisement, or with the consent of the lord, with any compensation payable, or with any part thereof respectively.

"(2) Where land is conveyed as the consideration for a voluntary enfranchisement under this Act, and the person conveying the land is absolute owner of the land conveyed, he may charge the land enfranchised with such reasonable sum as the Board of Agriculture consider to be equivalent to the value of the land conveyed, and with the expenses of the conveyance.

"(3) Where a lord purchases under this Act a tenant's interest in land, he may charge the land purchased, and the manor and any land settled therewith to the same uses, with the purchase-money and the expenses of the purchase.

"(4) When a charge may be made under this section, the expenses of the charge may be made included in the charge.

"(5) A charge under this section may be for a principal sum, and interest thereon, not exceeding five per cent. per annum, or may be by way of terminable annuity calculated on the same basis.

(*m*) 44 & 45 Vict. c. 41.
(*n*) 21 & 22 Vict. c. 94, set out *sup.*
(*o*) 44 & 45 Vict. c. 41.
(*p*) 57 & 58 Vict. c. 46.

"(6) A charge under this section may be by deed by way of mortgage, or by a certificate of charge under this Act.

"(7) A charge under this section shall be a first charge on the manor or land subject to the charge, and shall have priority over all incumbrances whatsoever affecting the manor or land, except tithe rentcharge, and any charge having priority by statute, notwithstanding that those incumbrances are prior in date.

"(8) Any money secured on land may be continued on the security thereof, notwithstanding a charge under this section."

Charge for lord's expenses.

Sect. 37.—"(1) Expenses incurred by a lord in proceedings under this Act may—

(a) be paid out of any consideration or compensation money (where it is a gross sum) arising in respect of the proceedings; or,

(b) be charged, together with the expenses of the charge, on the manor, or on land settled to the same uses as the manor, or on any rentcharge arising in respect of the proceedings, or in respect of any enfranchisement made under this Act within the manor.

"(2) A charge under this section shall be by deed by way of mortgage, or by a certificate of charge under this Act.

"(3) This section does not apply to the expenses of a purchase by the lord of a tenant's interest under this Act."

Charge for consideration money where tenant's title proves bad.

Sect. 38. "If a tenant or person claiming to be tenant pays any money in respect of the compensation or consideration for an enfranchisement under this Act, and is afterwards evicted from the land enfranchised, he may claim against the land enfranchised the amount of the money, or so much of it as is not charged on the land under the other provisions of this Act, and that amount shall be a charge on the land with interest thereon at the rate of four per cent. per annum from the date of the eviction."

Charge for money paid by mortgagee.

Sect. 39. "If a mortgagee pays under this Act any compensation or consideration money or expenses in respect of an enfranchisement of or redemption of a rentcharge on the mortgaged property, the amount so paid shall be added to his mortgage, and the mortgaged property shall not be redeemable without payment of that amount and interest thereon."

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SECTION III.

MORTGAGES UNDER THE SETTLED LAND ACTS.

i.—Power for Tenant for Life to Mortgage Settled Lands.—Powers of mortgaging settled lands are conferred upon tenants for life thereof by sect. 18 of the Settled Land Act, 1882 (*q*), for the purposes mentioned in the section, which is as follows:—

Mortgage for equality money, &c.

"Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on

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(*q*) 45 & 46 Vict. c. 38, s. 18.

mortgage of the settled land, or of any part thereof, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act."

The word "enfranchisement" includes the conversion of leasehold land into freehold by the purchase of the reversion. "Required" does not mean absolutely necessary (*r*).

These powers are extended by sect. 11 of the Settled Land Act, 1890 (*s*), whereby it is provided that—

Power to raise money by mortgage.

"(1.) Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

"(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives, or during a term of years absolute or determinable."

The word "required" in sect. 11 is not confined to cases where notice has been given to call in the mortgage money, but extends to all cases where the money is reasonably required, having regard to the circumstances of the settled land (*t*).

Transfer of incumbrances on land sold, &c.

In addition to the powers of mortgaging conferred upon him by the above sections, the tenant for life on a sale, exchange or partition, where there is an incumbrance affecting land sold or given in exchange, or on partition, "with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly" (*u*).

The expression "any other part of the settled land" is ex-

(*r*) *Re Bruce, Halsey* v. *Bruce*, (1905) 2 Ch. 372, 376.

(*s*) 53 & 54 Vict. c. 69, s. 11.

(*t*) *Re Clifford, Scott* v. *Clifford*, (1902) 1 Ch. 87. See *Re Bruce, sup.*

(*u*) 45 & 46 Vict. c. 38, s. 5. See also sect. 47 as to raising costs by mortgage, *post*, p. 403.

tended to "land acquired by purchase or in exchange, or on partition" (*x*).

A tenant for life can raise the money required to discharge an incumbrance on one estate or one part of an estate by means of a mortgage on another estate or another part of the estate, even though the settlement of the latter estate was the earlier in date and was made free from incumbrances, and the former estate was settled by the tenant for life himself and subject to the incumbrance (*y*).

The expenses of making up a street under the Public Health Act which have been paid by the tenant for life are an incumbrance within the section, and may be raised by him by mortgage of the settled land (*z*); and so are the expenses of paving a street under the Private Streets Works Act, 1892 (*a*).

There is no power under the Acts to raise the cost of executing improvements by a mortgage or charge of the inheritance (*b*).

Power of tenant for life to enter into contracts.

A tenant for life is also empowered, by sect. 31 of this Act, to contract to make a mortgage, and to vary or rescind the same with or without consideration, provided that any such consideration, if paid in money, is to be capital money arising under the Act. It is obvious that the mortgage so contracted to be made, varied or rescinded, means a mortgage for a purpose authorized by the statutory powers.

Infant.

ii.—**Mortgages of Settled Lands where the Owner is under Disability.**—An infant absolutely entitled in possession (*c*) to land of any tenure (*d*) is to be deemed tenant for life thereof (*e*); and where a tenant for life is an infant, the statutory powers may be exercised on his behalf by the trustees of the settlement, and, if there are none, by a person appointed by the Court for that purpose (*f*).

(*x*) 45 & 46 Vict. c. 38, s. 24 (1).

(*y*) *Re Lord Monson's Settled Estates*, (1898) 1 Ch. 427: and see *Re Coull's Settled Estates*, (1905) 1 Ch. 712. As to when a tenant for life will be restrained from exercising his power of mortgaging, see *post*, p. 399.

(*z*) *Re Smith's Settled Estates*, (1901) 1 Ch. 689.

(*a*) *Re Pizzi*, (1907) 1 Ch. 67.

(*b*) *Re Gray, Standing* v. *Gray*, (1903) 1 Ir. R. 49.

(*c*) *Re Horne*, 39 Ch. D. 84.

(*d*) *Re Simpson*, (1897) 1 Ch. 256.

(*e*) 45 & 46 Vict. c. 38, s. 59.

(*f*) *Ibid.* s. 60. See as to consent on behalf of infant, *Re Duke of Newcastle*, 24 Ch. D. 129, 142.

Chap.XXII. § 3 (ii.)

With regard to married women who are limited owners of settled lands, sect. 61 of the Act of 1882 enacts as follows: —

Married woman.

"(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

"(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act.

"(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

"(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

"(5.) The married woman may execute, make and do all deeds, instruments and things necessary or proper for giving effect to the provisions of this section.

"(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act."

Married Women's Property Act, 1882.

This enactment is materially affected by, and should be read in connection with, the provisions of the Married Women's Property Act, 1882 (*g*), which was passed later in the same session.

Infant married woman.

If a married woman is an infant, this disability will prevent her from exercising the statutory powers under this section, unless the intention is clear that the power should be exercised during minority (*h*); such powers will, however, be exerciseable on her behalf under sects. 59 and 60 of the Act (*i*).

Whether conveyance requires acknowledgment.

Inasmuch as a conveyance by a married woman under this section is made not by way of disposition under the Fines and Recoveries Act (*k*), but in exercise of a statutory power, it is conceived that the deed will not require acknowledgment, whether the power is exercised by herself alone, or by her and her husband together, and without regard to the date of her marriage.

(*g*) 45 & 46 Vict. c. 75.

(*h*) *Re D'Angibau*, 15 Ch. D. 228.

(*i*) *Hearle* v. *Greenbank*, 3 Atk. 695. See Sug. Powers, 177; but see Hood & Challis (6th ed.), p. 308.

(*k*) 3 & 4 Will. IV. c. 74, *ante*, p. 326.

Restraint on anticipation.

Where real estate stood limited to trustees upon trust for a married woman for her life for her separate use without power of anticipation, and after her death to the use of such persons as she should by will appoint, and in default of such appointment to the use of herself in fee, it was held that if she had not been a married woman she would have had the powers of a tenant for life under sect. 58, sub-sect. (1) (ix.), and accordingly that she could make a title as such to a purchaser (*l*).

But if a restraint on anticipation is annexed to an estate in fee simple of a married woman, who is of full age, there is no settlement, and she has not the powers of a tenant for life under the Act (*m*).

Lunatics.

With regard to lunatics who are limited owners of settled lands, sect. 62 of the Act of 1882 enacts that—

Tenant for life, lunatic.

> "Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate."

The application is now made by summons, unless the judge otherwise directs (*n*).

It has been held that where an infant is of unsound mind the ordinary jurisdiction of the Court in case of infants is not ousted unless there be a commission of lunacy (*o*).

By the Fines and Recoveries Act (3 & 4 Will. IV. c. 74), s. 91, it was provided that the Court of Common Pleas, in the case of a husband being a lunatic (whether so found by inquisition or not) may dispense with his concurrence in any case in which his concurrence is required by that Act, or otherwise (*p*), except where the Court shall be protector of a settlement in lieu of the husband (*q*). In order to obtain the order of the Court, it must be shown that the land is actually contracted to be conveyed (*r*).

(*l*) *Re Pocock and Prankerd's Contract*, (1896) 1 Ch. 302.

(*m*) *Bates* v. *Kesterton*, (1896) 1 Ch. 159.

(*n*) Lunacy Rules, 1892, r. 20.

(*o*) *Re Arrowsmith*, 4 Jur. N. S. 1122; *Beall* v. *Smith*, L. R. 9 Ch. 85, 92; *Re Edwards*, 10 Ch. D. 605.

(*p*) *Re Murphy*, 4 Man. & Gr. 635; *Re Turner*, 3 C. B. 166.

(*q*) See *Re Gaitskell*, 40 Ch. D. 416.

(*r*) *Re Graham*, 13 W. R. 762.

A committee intending to exercise the statutory powers of a tenant for life must previously obtain the authority of the Court (s). He cannot give the notice required by sect. 45 without an order in lunacy (s).

Notice must be given by the committee to the trustees of the settlement, as in any other case of an intended exercise of the statutory powers (t).

A lunatic not so found by inquisition cannot exercise the powers of a tenant for life under the Act; but a person may be authorized to exercise, on behalf of a lunatic not so found, powers given to him by a settlement (u).

Settlement by way of trust for sale.

iii.—Mortgages of Lands settled on Trust for Sale.—Where land is settled by deed, will, or other instrument upon trust for sale, it seldom happens that it becomes necessary or is thought advisable to raise money by mortgage pending the sale for purposes authorized by the Settled Land Acts.

In such a case, however, it is provided by sect. 63 of the Act of 1882 that the person or persons, if more than one, concurrently beneficially entitled to the income of the land, shall be deemed to be tenant for life thereof, and that the trustees for sale, or the persons by the settlement declared to be trustees thereof for the purposes of the Act, are to be trustees of the settlement. But, by the Settled Land Act, 1884 (x), where land is settled on trust for sale, the trustees may exercise any powers of mortgaging, or other powers given to them by the settlement, without the consent of the tenant for life, unless required by the settlement; and the tenant for life cannot exercise his statutory powers over lands so settled without the leave of the Court. An order of the Court giving such leave may be registered as a *lis pendens*, and, until rescinded or varied, has the effect of suspending all powers of the trustees, in respect of which leave is given, created by the settlement. No person dealing with the trustees is to be affected by an order giving leave, unless it is duly registered as a *lis pendens*.

(s) *Re Ray's Settled Estates*, 25 Ch. D. 464.

(t) *Re Taylor*, W. N. (1883) 95; 31 W. R. 596.

(u) *Re X.*, (1894) 2 Ch. 415.

(x) 47 & 48 Vict. c. 18, ss. 6, 7. See further as to these sections, Hood & Challis (7th ed.), pp. 343—347.

iv. Matters relating to the Exercise of Powers of Mortgaging by Tenants for Life.—It is provided by sect. 53 of the Act of 1882 (*y*), that—

Tenant for life trustee for all parties interested.

> "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

Court will restrain tenant for life from exercising power to prejudice of other parties.

Accordingly, where a tenant for life proposed to mortgage settled lands under sect. 11 of the Settled Land Act, 1890, under such circumstances that, by so doing, he would sacrifice the interests of certain annuitants thereon, which a sale of the settled land would preserve, the Court of Appeal, holding that the tenant for life (although acting *bonâ fide* and with a view to preserve the estates for those intended by the settlor to enjoy them) was not justified in the proposed course, and holding that the Court had power to interfere, restrained the tenant for life from mortgaging otherwise than subject to the rights of such annuitants (*z*). But this is the farthest that the Court has gone in controlling the discretion of the tenant for life (*a*).

Trustees bound by direction of tenant for life.

Where the tenant for life directs the trustees under sect. 22 (2) to invest capital moneys on a particular mortgage, the choice of the particular investment lies with the tenant for life; and if he in good faith directs the trustees to invest in a particular security such direction is binding, and it is not for the trustees to say that in their discretion they do not think the investment expedient (*b*). At the same time the trustees are not bound to act upon the direction of the tenant for life, unless they are satisfied that the direction was given upon a proper report and advice as to the title and value and form of the proposed mortgage; but upon being so satisfied they are bound to comply with such direction (*c*). If they are not so satisfied they are not bound to act on the direction of the tenant for life, even though given *bonâ fide*, but may take the direction of the Court (*d*).

Powers not assignable.

By sect. 50 of the Act of 1882 the statutory powers of a tenant

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(*y*) 45 & 46 Vict. c. 38.

(*z*) *Hampden* v. *Earl of Buckinghamshire*, (1893) 2 Ch. 531, C. A.

(*a*) (1900) 2 Ch. p. 790.

(*b*) *Re Coleridge's Settlement*, (1895) 2 Ch. 704.

(*c*) *Re Hotham, Hotham* v. *Doughty*, (1902) 2 Ch. 575.

(*d*) *Re Hunt's Settled Estates*, (1905) 2 Ch. 418.

for life, including powers of mortgaging, are not capable of assignment or release, and any contract not to exercise them is void; but these provisions are not to operate to the prejudice of any assignee for value of the estate or interest of the tenant for life, and the assignee's rights are not to be affected without his consent, except that unless the assignee or mortgagee is actually in possession his consent is not required to a lease by the tenant for life. If, therefore, a tenant for life has mortgaged his life estate, a subsequent mortgage of the fee under the statutory powers will not affect the rights of the mortgagee of the life estate without his consent.

If the mortgagee of the tenant for life has consented in writing to a sale the purchaser cannot require him to join in the conveyance (*e*). If the mortgagee be himself the purchaser the contract for purchase is a consent (*f*).

Prohibition.

The tenant for life can exercise his statutory powers, notwithstanding any prohibition or restriction attempted to be imposed by the settlement, or any limitation or provision therein contained, which tends, or is intended, to prohibit or restrain such exercise (*g*); and the exercise of a statutory power is not to occasion a forfeiture (*h*).

By sect. 56 of the Act of 1882 (*i*) it is enacted as follows:—

Saving for other powers.

"(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction or otherwise; and the powers given by this Act are cumulative.

"(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act."

(*e*) *Re Dickin and Kelsall*, (1908) 1 Ch. 213.

(*f*) *Re Kingsley and Holder*, 115 L. T. Jo. 201.

(*g*) 45 & 46 Vict. c. 38, s. 51. See *Re Paget's Settled Estates*, 30 Ch. D. 161; *Re Clitheroe Estate*, 31 Ch. D. 138; *Re Ames, Ames* v. *Ames*, (1893) 2 Ch. 479.

(*h*) 45 & 46 Vict. c. 38, s. 52. See *Re Haynes, Kemp* v. *Haynes*, 37 Ch. D. 306.

(*i*) See S. L. Act, 1884, s. 6.

The powers of the Act override the powers of a private estate Act passed previously to the commencement of the Settled Land Act (*k*).

It is submitted that the consent of the tenant for life would not be necessary to the exercise of a power given to trustees for raising charges by mortgage, since the trustees would have a title paramount to that of the tenant for life (*l*).

Sub-sect. 2 is not confined to the case of a tenant for life, but includes also a person having the powers of a tenant for life (*m*). Its provisions are provisions connected with the execution of any power under the Act, and not with the results of such execution, and, therefore, where a tenant for life has a power under the settlement and a similar power under the Act, the provisions of the Act will not override the settlement under which the donee of the power derives a greater benefit (*n*).

And by sect. 57 of the same Act it is enacted that—

Additional or larger powers by settlement.

"(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

"(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement."

Express power inconsistent with statutory powers.

Where (*o*) trustees of a settlement were empowered by the direction of the tenant for life to raise money by mortgage of the settled lands to be applied by him for improvements, similar to those authorized by the Settled Land Acts, with a proviso for the formation of a sinking fund out of the rents and profits to recoup to the estate the money raised, it was held that the tenant for life was not precluded from resorting to his statutory powers, but that, the express power having been resorted to, the rents and profits were liable to payment of instalments of the sinking fund, without prejudice to any application which the

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(*k*) *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651. See *Talbot* v. *Scarisbrick*, (1908) 1 Ch. 812.

(*l*) See *Re Carne's Settled Estate*, (1899) 1 Ch. 324; and *Lonsdale (Earl)* v. *Lowther*, *inf.*

(*m*) *Re Osborne and Brights*, (1902) 1 Ch. 335.

(*n*) *Lonsdale (Earl)* v. *Lowther*, (1900) 2 Ch. 687.

(*o*) *Re Sudbury and Poynton Estates*, *Vernon* v. *Vernon*, (1893) 3 Ch. 74.

tenant for life might make under sect. 15 of the Settled Land Act, 1890 (*p*).

Notice to trustees.

By sect. 45 of the Act of 1882, a tenant for life, when intending to make a mortgage or charge, must give specific notice of his intention to the trustees of the settlement (*q*) and to their solicitor by registered letters sent through the post not less than one month before making the particular mortgage or charge (*r*).

Effect of mortgage deed.

By sect. 20 a mortgage or charge may, as regards lands mortgaged or charged, including copyholds or customary or leasehold land vested in trustees, be effected by deed for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the mortgage or charge. Such a deed is effectual to pass the land conveyed "discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder," except (1) estates, interests and charges having priority to the settlement; (2) estates, &c. previously conveyed or created for securing money actually raised at the date of the deed; and (3) leases, fee farm and other grants, easements, and other rights and privileges subsisting at the date of the deed. The deed will pass the common law estate in fee simple or for any less interest in the case of freeholds or leaseholds, and in the case of copyholds the right to admission which the steward, on production of the deed, is required to enter on the court rolls.

Where mortgages have been made for raising portions or other charges the mortgagee's estates fall within s. 20 (2), and the tenant for life can only displace such charges before the sums have been actually raised by mortgage, and not afterwards (*s*).

Mortgagee of life estate

On a sale by a tenant for life, a mortgagee of the life estate cannot be required to join in the conveyance to the purchaser. His consent once obtained, the tenant for life can convey under s. 20 discharged from his own mortgage, for the estates,

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(*p*) 53 & 54 Vict. c. 69.

(*q*) For definition of the expression "trustees of the settlement" for the purposes of the Acts, see 45 & 46 Vict. c. 38, s. 2 (8); 53 & 54 Vict. c. 69, s. 16.

(*r*) The provision in the stat. 47 & 48 Vict. c. 18, s. 5, making a general notice sufficient does not apply to mortgages: *Re Ray*, 25 Ch. D. 464.

(*s*) *Du Cane* v. *Nettlefold*, (1898) 2 Ch. 96, 108; *Re Mundy and Roper*, (1899) 1 Ch. 275, 289.

interests, and charges mentioned in s. 20 (2) are only such as arise under the settlement and not those created by the tenant for life (*t*).

by remaindermen.

Section 20 (2) does not apply to mortgages by remaindermen, and therefore a purchaser from the tenant for life is not concerned to inquire whether the remaindermen have incumbered their interests (*u*).

Payment and application of moneys advanced on mortgage of settled lands.

The money raised by a tenant for life under his statutory powers of mortgaging is capital money arising under the Acts (*x*), and must (unless paid into Court) be paid to the trustees (*y*), who should be parties to the mortgage deed for the purpose of acknowledging the receipt of the money; such receipt will be an effectual discharge to the mortgagee, and from being bound to see to the application of the money, or being liable for the loss or misapplication thereof, and from being concerned from seeing that the money advanced is required for any purpose of the Acts, or that no more than what is wanted is raised (*z*). A mortgagee dealing in good faith with a tenant for life is, as against all parties entitled under the settlement, to be conclusively taken to have complied with all the requisitions of the Act (*a*).

Mortgage to raise costs.

Where the Court directs any costs, charges or expenses to be paid out of property subject to a settlement, the same may, subject and according to the directions of the Court, be raised by means of a mortgage of the settled land or any part thereof, to be made by such person as the Court directs (*b*).

Costs of incumbrancers on life estate.

A tenant for life directing payment out of capital of the costs of incumbrancers on the life estate is not doing his duty as a trustee, and the trustees ought not to pay them (*c*).

(*t*) *Re Dickin and Kelsall's Contract*, (1908) 1 Ch. 213.

(*u*) *Re Davies and Kent*, (1910) 2 Ch. 35.

(*x*) 45 & 46 Vict. c. 38, s. 18; 53 & 54 Vict. c. 69, s. 11.

(*y*) 45 & 46 Vict. c. 38, s. 22.

(*z*) *Ibid.* s. 40.

(*a*) *Ibid.* s. 54; *Re Handman and Wilcox*, (1902) 1 Ch. 599.

(*b*) *Ibid.* s. 47.

(*c*) *Re Peel's Settled Estates*, (1910) 1 Ch. 389.

CHAPTER XXIII.

MORTGAGES BY EXECUTORS AND TRUSTEES.

SECTION I.

MORTGAGES OF PERSONALTY BY EXECUTORS AND ADMINISTRATORS.

General powers of executors

i.—Of the Power to mortgage Personalty of a Deceased Person.—The whole personal estate of a testator, including leaseholds, vests in the executor, who, from the duties of his office and the nature of his trusts, must necessarily have an absolute power over it (*a*), whether specifically bequeathed (*b*), or limited in trust (*c*), or otherwise. His first duty is to provide for payment of debts; and if the general undisposed-of property or the fund expressly provided by a testator is not sufficient for such purpose, the property specifically bequeathed or given in trust must be resorted to. Nor can a testator, by any testamentary disposition of his personal estate, frustrate or delay the claims of his creditors (*d*).

Power of sale.

In order to carry out this duty, it often happens that the executor must sell or otherwise dispose of the assets; and, if he does so, the assets cannot be followed by any creditor or legatee into the hands of an alienee (*e*). For no one would deal with an executor if liable afterwards to be called to account (*f*). In case of misapplication of the money, the creditor or legatee has no remedy against the purchaser, but only against the executor, and notice of the will does not prejudice the purchaser in this respect (*g*).

(*a*) *Nugent* v. *Gifford*, 1 Atk. 463.

(*b*) *Ewer* v. *Corbet*, 2 P. Wms. 149; *Burting* v. *Stonard*, *ibid.* 150; *Langley* v. *Earl of Oxford*, Amb. 17; *Andrew* v. *Wrigley*, 4 Bro. C. C. 125.

(*c*) *M'Leod* v. *Drummond*, 17 Ves. 152, at p. 161.

(*d*) *Andrew* v. *Wrigley*, *sup.*

(*e*) *Whale* v. *Booth*, 4 T. R. 625, n.; *Nugent* v. *Gifford*, *sup.* See *Spackman* v. *Timbrell*, 8 Sim. 260; *Dilkes* v. *Broadmead*, 2 De G. F. & J. 566; *Wolverhampton Bank* v. *Marston*, 7 H & N. 148.

(*f*) Per Lord Mansfield, in *Whale* v. *Booth*, *sup.*

(*g*) *Ewer* v. *Corbet*, 2 P. Wms. 148. See *Andrew* v. *Wrigley*, 4 Bro. C. C. 125.

Mortgage of assets by executor.

As the executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no good reason why, in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets. Accordingly, this proposition has been repeatedly recognized by high authorities (*h*). Lord Loughborough, indeed, is reported to have said, that a mortgage is not a natural way of raising money, and that it may lead to an inquiry as to the circumstances of the testator's estate (*i*); but this observation, it is conceived, must be considered as applying to transactions attended with circumstances exciting suspicion of fraud. The right of executors to mortgage the leaseholds or other personalty of a testator or intestate is established beyond question, and the power is now extended by the Land Transfer Act, 1897, to the freeholds of a testator or intestate dying after 1897 (*j*).

Power to sell or mortgage a specific legacy.

The power of executors to dispose of a specific legacy seems to have been questioned in an early case (*k*); and Lord St. Leonards, in his Treatise on Vendors and Purchasers, raised a doubt whether it is safe to take an assignment of a specific legacy from the executor without the concurrence of the specific legatee, lest the executor should have assented to the bequest. In former editions of this work an opinion was expressed that if a purchaser or mortgagee *bonâ fide* deals with an executor within a reasonable time after the testator's death, and obtains posesssion of the muniments of title, a specific legatee would not be permitted to set up the executor's assent against the sale or mortgage (*l*). But it must be remembered that the legacy vests absolutely in the legatee on the assent of the executor; and even in equity the title of an assignee from the legatee would seem to prevail over that of a subsequent purchaser or mortgagee from the executor.

Where the specific legatee is also an executor, no difficulty arises, as the purchaser or mortgagee is not bound to inquire as

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(*h*) *Mead* v. *Lord Orrery*, 3 Atk. 239; *Scott* v. *Tyler*, 2 Dick. 724; *M'Leod* v. *Drummond*, 17 Ves. 154; *Berry* v. *Gibbons*, L. R. 8 Ch. 747; *Re Cooper*, 20 Ch. D. 611, C. A.

(*i*) *Andrew* v. *Wrigley*, 4 Bro. C. C. at p. 138.

(*j*) *Re Cavendish*, W. N. (1912) 83.

(*k*) *Humble* v. *Bill*, 2 Vern. 444.

(*l*) See *Scott* v. *Tyler*, 2 Dick. 712.

to the assent (*m*). But in other cases it is advisable to require the concurrence of the specific legatees.

Insolvent estate.

A mortgage of assets by an executor to secure a debt of his testator is valid, though the estate is insolvent (*n*).

Powers of administrator.

An administrator derives his authority entirely from the appointment of the Court (*o*), but after the administration is granted, the power and interest of the administrator over personalty is equal to the power and interest of the executor (*p*).

An administrator *durante minore ætate* has all the powers of an executor (*q*).

Effect of administration decree.

Although, generally speaking, after an administration decree, powers can only be exercised with the sanction of the Court (*r*), yet the power of an executor to mortgage the assets is not affected by an administration decree, where no receiver has been appointed, nor any injunction granted restraining the executor from dealing with the assets (*s*).

Institution of proceedings.

The mere institution of an action does not prevent executors from dealing with the assets (*t*).

Application for sanction of Court.

An executor or trustee is, however, entitled to apply for the sanction of the Court even before decree, and will be allowed his costs of such application (*u*).

Form of application.

An application to sanction raising of money by mortgage of a testator's estate could not be made by originating summons under Order LV. r. 3 (*x*). In the case referred to, the summons was amended by making it one for the administration of the real estate under Rule 4, so as to allow of the application being subsequently made for the sanction of the Court.

Mortgagee not bound to see to application of money.

ii.—Application of Moneys advanced.—As a general rule, a mortgagee is not bound to see to the application of money advanced by him to an executor or administrator, unless he has notice that the money is intended to be applied otherwise than for the purposes of the administration of the estate (*y*). The

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(*m*) *Taylor* v. *Hawkins*, 8 Ves. 209; *Cole* v. *Miles*, 10 Ha. 179.

(*n*) *Earl Vane* v. *Rigden*, L. R. 8 Ch. 663.

(*o*) *Wankford* v. *Wankford*, 1 Salk. 301.

(*p*) Shep. Touchst. by Preston, 474.

(*q*) *Re Cope*, 16 Ch. D. 49.

(*r*) Farwell on Powers, 41 *et seq.*

(*s*) *Berry* v. *Gibbons*, L. R. 8 Ch. 747; *Re Barrett*, *Whitaker* v. *Barrett*, 43 Ch. D. 70.

(*t*) *Neeves* v. *Burrage*, 14 Q. B. 504. See *Cafe* v. *Bent*, 3 Ha. 245.

(*u*) *Turner* v. *Turner*, 30 Beav. 414. See R. S. C., Ord. LV. r. 2 (14).

(*x*) *Walley* v. *Robinson*, W. N. (1884) 144. See now Land Transfer Act, 1897.

(*y*) *Scott* v. *Tyler*, 2 Dick. 712; *M'Leod* v. *Drummond*, 17 Ves. 154; *Elliot* v. *Merriman*, Barn. Ch. R. 78.

mortgage need not, therefore, state that the money is wanted for the purposes of administration, for, in order to vitiate the security, it must be shown that the mortgage was not for the payment of debts, and that the mortgagee knew, or ought to have known, that such was the case (*z*). And by statutory enactment, in the absence of fraud or notice of any impropriety, the receipt in writing of an executor or administrator will effectually exonerate the person paying the money advanced from seeing to its application or being answerable for the misapplication thereof (*a*).

Mortgage to secure executor's own debt.

It is a settled rule of equity (*b*) that, generally speaking, an executor cannot make a valid assignment or pledge of the assets as a security for his own debt (*c*). Two decisions of Lord Hardwicke sustaining such transactions (*d*) appear to be referable to the particular circumstances of those cases (*e*).

Mortgage partly for purposes of administration.

When the mortgage is partly for purposes of administration and partly for the private purposes of the executor, the security is valid to the extent only to which it is shown that the money was applied for the purposes of administration (*f*).

Executor beneficially entitled to share.

Where an executor who is beneficially entitled to a share in his testator's general estate, deposits the title deeds of the estate to secure his own debt, the deposit only affects his own interest (*g*).

Executor also specific legatee.

If the executor is also specific legatee, a mortgage from him of the specific legacy for satisfaction of his private debt will be safe, unless it can be shown that the mortgagee knew that there were debts of the estate unpaid (*h*). But of course, on failure of the security, the mortgagee cannot prove against the estate (*i*).

Executor also residuary legatee.

The mortgagee of an asset from an executor who is also residuary legatee acquires a title free from unsatisfied creditors

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(*z*) *Bonney* v. *Ridgard*, 1 Cox, 145.

(*a*) 56 & 57 Vict. c. 59, s. 20, repealing (s. 51) and re-enacting 44 & 45 Vict. c. 41, s. 36.

(*b*) Formerly, at law, it was laid down that an executor might dispose of the assets in satisfaction of his own debt in the absence of fraud on the part of the creditor: *Whale* v. *Booth*, 4 T. R. 625, n.; *Farr* v. *Newman*, 4 T. R. 642, 645.

(*c*) *Wilson* v. *Moore*, 1 My. & K. 337; *Eland* v. *Eland*, 4 My. & Cr. 420; *Haynes* v. *Forshaw*, 11 Ha. 95; *Collinson* v. *Lister*, 7 De G. M. & G. 634; *Re Morgan*, *Pillgrem* v. *Pillgrem*, 18 Ch. D. 93, 98; *Ricketts* v. *Lewis*, 20 Ch. D. 745.

(*d*) *Nugent* v. *Gifford*, 1 Atk. 463; *Mead* v. *Lord Orrery*, 3 Atk. 235.

(*e*) *Taner* v. *Ivie*, 2 Ves. Sen. 466.

(*f*) *Carter* v. *Sanders*, 2 Drew. 248. See *Re Brettle*, *Brettle* v. *Burdett*, 2 De G. J. & S. 244.

(*g*) *Farhall* v. *Farhall*, L. R. 7 Ch. 123.

(*h*) *Taylor* v. *Hawkins*, 8 Ves. 209; *Hall* v. *Andrews*, 20 W. R. 799.

(*i*) *Farhall* v. *Farhall*, *sup.*

if he took without notice, provided that neither the executor nor the Court retains control over the asset (*k*).

A mortgage made by an executor who is also residuary legatee to secure his private debt, will be postponed to an unsatisfied legacy charged upon the mortgaged property (*l*).

Fraudulent dealing with executor.

Fraud or collusion will vitiate any transaction, and turn it to a mere colour. If one concerts with an executor, by obtaining the testator's effects at a nominal price, or at a fraudulent under-value, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or *in any other manner* contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee, and make him liable to the full value (*m*).

So, if a person lends money on mortgage to an executor or administrator collusively, and with knowledge that the borrower is acting fraudulently in violation of his trust, and to the detriment of the persons beneficially interested in the estate, the transaction will be wholly vitiated by the fraud, and the security will be void and incapable of being enforced (*n*).

Notice of intended application of money to improper purpose.

Even in the absence of direct fraud, a mortgage of assets by an executor or administrator may be incapable of being enforced if the mortgagee had, at the time of the advance, actual or constructive notice (*o*) that the money was intended to be applied for purposes other than those of the administration of the estate (*p*).

There have been several decisions as to what circumstances amount to notice that the mortgage is for the executor's own purposes (*q*). The Court will not lightly impute notice to a mortgagee dealing with an executor (*r*). So, the fact that a mortgage included property of the executor as well as property of his testator was held not to be sufficient (*s*). And it is not enough, in order to impeach a mortgage of assets, to show that it was made to secure a debt originally contracted by an

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(*k*) *Graham* v. *Drummond*, (1896) 1 Ch. 968.

(*l*) *Bank of Bombay* v. *Suleman Somji* (No. 2), 99 L. T. 532.

(*m*) *Scott* v. *Tyler*, 2 Dick. 712. See *Rice* v. *Gordon*, 11 Beav. 265.

(*n*) *Doe* v. *Fallows*, 2 Cr. & J. 483. See *Re Scott and Alvarez's Contract*, (1895) 1 Ch. 596, C. A.

(*o*) See further, as to what will amount to constructive notice of prior equities, *post*, Chap. LVIII. Sect. II.

(*p*) *Hill* v. *Simpson*, 7 Ves. 152.

(*q*) *Collingwood* v. *Russell*, 10 Jur. N. S. 1063; *Howard* v. *Chaffers*, 2 Dr. & S. 236; *Farhall* v. *Farhall*, L. R. 7 Ch. 123.

(*r*) *Collingwood* v. *Russell*, *sup.*

(*s*) *Barrow* v. *Griffith*, 11 Jur. N. S. 6.

executor on his personal security, without reference to his representative capacity, or to the assets (*t*).

Notice that debts are unpaid.

In the absence of fraud or collusion, though a mortgage by an executor, who is also specific legatee of his legacy, to secure his own debt, is generally valid (*u*), yet if the mortgagee is at the time of making the advance aware that the testator's debts are unpaid, he will not be allowed to retain the mortgaged legacy as against the creditors (*x*).

Notice that intended purpose is not incident to the administration.

Again, the circumstances of the transaction may be such as to affect a mortgagee of assets with notice that the money cannot be required for purposes properly incident to the administration of the estate. So, where an administratrix, twenty years after the intestate's death, mortgaged leaseholds of the intestate held under old leases, which were not produced, in order to raise money for repairing the property of which, being also one of the next of kin, she was in occupation; it was held that the lapse of time raised the presumption that there were no debts of the testator remaining unpaid, and that the onus of proving that the leases contained covenants by the lessee to repair was on the mortgagee, and that this not having been proved, the presumption was that the borrower required the money, not for purposes of administration, but for her own beneficial enjoyment of the property, and accordingly the charge was disallowed except to the extent of the share of the administratrix as next of kin (*y*).

Notice of particular trust.

Further, "personal estate may be clothed with such a particular trust that it is possible the Court, in some cases, may require a purchaser of it to see the money rightly applied" (*z*). On this principle, where an administrator was empowered by the next of kin by a memorandum in writing to borrow on mortgage of certain leaseholds forming part of the intestate's estate such sums as he might require for certain purposes specified in the memorandum, and deposited the lease and memorandum as a security for a debt of his own; the depositee did not give notice of his charge to the next of kin, who, subsequently, on settlement of the accounts of the estate, withdrew

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(*t*) *Miles* v. *Durnford*, 2 De G. M. & G. 641.

(*u*) *Supra*, p. 407.

(*x*) *Crane* v. *Drake*, 2 Vern. 616.

(*y*) *Ricketts* v. *Lewis*, 20 Ch. D. 745. See *Collinson* v. *Lister*, 7 De G. M. & G. 634. But see *Re Venn and Furze*, (1894) 2 Ch. 101, and *Solomon* v. *Attenborough*, *post*, p. 427.

(*z*) Per Lord Kenyon in *Elliot* v. *Merriman*, 2 Atk. 41.

the authority to borrow; the administrator then executed to the depositee a formal mortgage of the leaseholds; it was held that the mortgage did not create a valid charge on the shares of the next of kin (*a*).

Appropriation of particular fund to debts.

If a particular fund is pointed out by the will for the payment of debts, it may become necessary for a mortgagee to inquire if that fund has been exhausted.

Conflict of equities.

A mortgagee, even in the absence of fraud or notice that the money is to be improperly applied, may find his security prejudiced, unless he has been careful to protect himself by obtaining the legal estate in the mortgaged property against the prior equitable rights of those claiming under a will or intestacy. So, where an executor took, in his own name, a renewal of a lease belonging to his testator's estate, and deposited the renewed lease by way of equitable mortgage for money advanced to him for his own purposes by a person who did not know that the borrower was an executor, it was held that the lease being in equity a part of the testator's estate, and the conflict being between two equitable titles, the equity of the estate was prior to the equity of the mortgagee, and must prevail (*b*).

Assets may be followed.

Where a mortgage by an executor or administrator is set aside on the ground of fraud or negligence, a creditor, or a legatee, whether pecuniary, specific, or residuary, may follow the assets into the hands of the mortgagee (*c*).

Delay.

But relief will be refused if there is unreasonable delay in making a claim (*d*).

Subjects of mortgage.

iii.—Subject-Matter and Form of Mortgage.—A mortgage of personal property given by an executor or administrator may be either of legal or equitable assets (*e*), or of mere choses in action (*f*).

Form of mortgage.

The mortgage may be by actual assignment, or by deposit (*g*). In dealing with the leaseholds of a testator or intestate, an

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(*a*) *Jones* v. *Stohwasser*, 16 Ch. D. 577.

(*b*) *Re Morgan, Pillgrem* v. *Pillgrem*, 18 Ch. D. 92, C. A. See *post*, Chap. LV., Sect. III. (ii).

(*c*) *Hill* v. *Simpson*, 7 Ves. 152; *Wilson* v. *Moore*, 1 My. & K. 337; *Re Champion*, (1893) 1 Ch. 101.

(*d*) *Elliot* v. *Merriman*, 2 Atk. 41; *Andrew* v. *Wrigley*, 4 Bro. C. C. 125; *M'Leod* v. *Drummond*, 17 Ves. 152; *Re Eustace*, (1912) 1 Ch. 561.

(*e*) *Nugent* v. *Gifford*, 1 Atk. 463.

(*f*) *Scott* v. *Tyler*, 2 Dick. 712; *Earl Vane* v. *Rigden*, L. R. 5 Ch. 663.

(*g*) *Ibid.*

executor or administrator may, in a proper case, grant an under-lease (*h*) ; and, accordingly, it would seem that he may give a mortgage by way of sub-demise.

As regards personal estate, any disposition by one of several executors will be valid, for each is competent (*i*), and one executor may open a separate account with a banker on the executorial account, and validly pledge securities of the estate with him (*k*).

But as regards real estate, all the *proving* executors must join in a mortgage or transfer (*l*).

Executor or administrator may give power of sale.

An executor or administrator may properly give to a mortgagee a power of sale over the mortgaged property (*m*); such powers are now implied by virtue of the statute (*n*) in every mortgage by deed, unless expressly excluded.

Special covenants.

An executor must not, however, clog the equity of redemption by the insertion in the deed of extraneous matters such as a consolidation clause, providing that he shall not be entitled to redeem without paying all moneys due to the mortgagee under every other mortgage made by him otherwise than as executor; and, if he do so, the estate will not be bound, and any liability in respect of such matters will fall on the executor personally (*o*).

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SECTION II.

MORTGAGES OF REALTY BY EXECUTORS, ETC. FOR PURPOSES OF ADMINISTRATION.

Charge of debts, &c. authorizes mortgage.

i.—Charge of Debts.—If a testator expressly or by implication charges his real estate with the payment of his debts or legacies, this will authorize a sale or mortgage of the real estate for that purpose. If, however, there is no such charge, real estate cannot, apart from the Land Transfer Act, 1897, be

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(*h*) *Oceanic Steam, &c. Co.* v. *Sutherberry*, 16 Ch. D. 236, C. A.

(*i*) *Scott* v. *Tyler*, 2 Dick. 725.

(*k*) *Child* v. *Thorley*, 16 Ch. D. 151.

(*l*) See Land Transfer Act, 1897, s. 2 (2); Conveyancing Act, 1911, s. 12.

(*m*) *Russell* v. *Plaice*, 18 Beav. 21; *Cruikshank* v. *Duffin*, L. R. 13 Eq. 555.

(*n*) 44 & 45 Vict. c. 41, s. 19.

(*o*) *Thorne* v. *Thorne*, (1893) 3 Ch. 196.

disposed of by the executors, or by the trustees of the will, unless expressly empowered to dispose of it (*p*).

Effect of Land Transfer Act.

A charge of debts since the Land Transfer Act, 1897, is unnecessary (*q*), but it is not altogether nugatory since it has the effect of bringing the debts within the Real Property Limitation Act, 1874, so as to make the period of limitation twelve years instead of six (*r*).

Power of Court to order mortgage for payment of testator's debts.

As regards cases where there is no express or implied charge of debts upon the realty, by several statutes (*s*) the real estates of deceased persons have been rendered answerable in the hands of the heir or devisee for the payment of the debts of his ancestor or testator; and the Court may order the money required for the payment of such debts to be raised by sale or mortgage. By the stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 12, where an estate is settled by will upon a person or persons having a limited interest, and an order for sale or mortgage is made, such persons may be directed to convey, and such conveyance will effectually pass the fee simple; and by sect. 11 of the last-mentioned Act, where the heir or devisee is an infant, the Court may order an immediate sale and conveyance of the real estates for payment of the debts.

Settled lands.

And in case of settlement by will upon persons having a limited interest, a conveyance is to be directed for the payment of debts (*t*).

Surplus moneys.

Whether the Court had power under this Act to decree the debtor's estate to be mortgaged, instead of being sold for payment of debts, and to direct the infant heir or devisee to convey under sect. 11, was doubtful (*u*); but the doubt was removed by the later Act, 2 & 3 Vict. c. 60, which provided that the surplus of the moneys raised by sale or mortgage under 1 Will. IV. c. 47, should devolve in the same manner, and belong to the same persons as the lands would have done if not so sold or mortgaged.

What expressions in a will

The power of mortgaging realty given to trustees and exe-

(*p*) See *post*, p. 422. As to mortgages by trustees under express powers, see *post*, pp. 431 *et seq.*

(*q*) *Re Kempster*, (1906) 1 Ch. 446.

(*r*) *Re Balls*, (1909) 1 Ch. 791.

(*s*) 11 Geo. IV. & 1 Will. IV. c. 47; 3 & 4 Will. IV. c. 104. See also 32 & 33 Vict. c. 46; and 38 & 39 Vict. c. 77, *post*, p. 997.

(*t*) 11 Geo. IV. & 1 Will. IV. c. 47, s. 12. And see 11 & 12 Vict. c. 87; Carson, R. P. Stat. p. 395.

(*u*) Cf. *Hulme* v. *Williams*, 8 Sim. 557; and *Smethurst* v. *Longworth*, 2 Keen, 603.

Chap. XXIII. § 2 (i.)

— amount to a charge of debts, &c.

cutors by Lord St. Leonards' Act, to be presently considered, arises only where a testator has charged his realty with the payment of debts or legacies. Even under the old law, prior to the Act, the power of an executor to alienate his testator's realty for payment of debts, &c. depended on the question as to whether the will indicated an intention that the debts should be charged on the realty. The question whether the expressions of a particular will sufficiently indicate such an intention is often one of great difficulty, and has given rise to some conflict of judicial opinion (*x*); but the tendency of later decisions has been strongly in favour of implying the charge from general expressions.

Effect of general direction to pay debts.

A general direction in a will that debts shall be paid, as a general rule charges them on all the testator's real estate (*y*), unless a contrary intention appears in the will (*z*). But a mere authority to trustees, who were also executors, "to adjust and pay all claims" upon the testator's estate, was held not to charge the debts on the real estate (*a*).

What amounts to such a direction.

A direction to pay debts may be given by informal words, as by the expressions "my debts being satisfied, I give, &c." (*b*), or "after payment of debts, I give, &c." (*c*). And a general devise and bequest of realty and leaseholds and all the residue of the testator's personal estate after payment of his debts, was held to charge the realty as well as the personalty (*d*).

Blended fund.

Indeed a charge of debts on realty may be implied though the will does not refer to debts, as when the will directs realty and personalty to be sold, without saying by whom, and the proceeds to be divided as a blended fund, then, inasmuch as the personalty is necessarily liable to the debts, a charge thereof will be implied so as to enable the executors to sell or mortgage the realty for payment of debts (*e*).

Contrary intention.

But the general directions may be overruled by expressions of contrary intention contained in the will.

(*x*) See the cases cited in Jarman on Wills (5th ed.), vol. ii. pp. 1390 *et seq.*

(*y*) *Shallcross* v. *Finden*, 3 Ves. 737; *Clifford* v. *Lewis*, 6 Madd. 33; *Ball* v. *Harris*, 4 My. & Cr. 264; *Shaw* v. *Borrer*, 1 Keen, 559; *Harding* v. *Grady*, 1 Dr. & War. 430; *Elliott* v. *Montgomery*, Ir. R. 5 Eq. 214; *Re Adams and Perry*, (1899) 1 Ch. 554.

(*z*) See *inf.*

(*a*) *Re Head's Trustees and Macdonald*, 45 Ch. D. 310, C. A.

(*b*) *Harris* v. *Ingledew*, 3 P. Wms. 91.

(*c*) *Shallcross* v. *Finden*, 3 Ves. 737.

(*d*) *Withers* v. *Kennedy*, 2 My. & K. 607.

(*e*) *Tylden* v. *Hyde*, 2 S. & St. 238; *Forbes* v. *Peacock*, 11 Sim. 152; 12 Sim. 528; 11 M. & W. 630; *Mackintosh* v. *Barber*, 1 Bing. 50.

So a direction that the executors shall pay the debts, raises a presumption that the testator intended that the debts shall be paid only out of the property which passes to the executor, and will accordingly exonerate the realty (*f*).

Devise to executor of realty charged with debts.

The presumption, however, may be rebutted if there is a devise or appointment of real estate to the executors, whether beneficially (*g*), or in trust (*h*), and in such cases the real estate will be generally held to be charged accordingly so as to enable the executors to sell or mortgage it. A devisee, who is also an executor, having real estate charged with the payment of debts, is, in effect, in a position similar to that of an executor dealing with personal estate; and, as an executor dealing with the personal estate of a testator, may sell it or mortgage it for the purpose of raising money, and as, in the case of personalty, it is to be inferred, unless the contrary is shown, that he is doing that for the purpose of paying debts, so, with regard to one holding real estate charged with the payment of debts, and filling the position of executor, it is also to be inferred, if he raises money by sale or mortgage of that real estate, that he is using the money as he properly ought to use it, for the same purpose (*i*).

But the question as to whether a devise of real estate to executors, coupled with a direction to them to pay debts, amounts to a charge upon the real estate, is one of intention (*k*). So where the entirety of the real estate is not devised to the executors, it is a question of intention to be collected from the whole will, so that where the devise is to one only of several executors (*l*), or unequal benefits are given to the executors, the general rule would not apply and there would be no charge, and, consequently, no power to sell or mortgage (*m*). So where part of the real estate was devised to sons, and part to the executors in

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(*f*) *Wasse* v. *Heslington*, 3 My. & K. 495; *Cook* v. *Dawson*, 29 Beav. 126; *Re Bailey*, *Bailey* v. *Bailey*, 12 Ch. D. 268, 272.

(*g*) *Henvell* v. *Whitaker*, 3 Russ. 343; *De Burgh Lawson* v. *De Burgh Lawson*, 41 Ch. D. 568. It makes no difference if the devise is for life or in tail: *Finch* v. *Hattersley*, 3 Russ. 345, n.; *Harris* v. *Watkins*, Kay, 438; *Cook* v. *Dawson*, 29 Beav. 123.

(*h*) *Barker* v. *Duke of Devonshire*, 3 Mer. 310; *Dormay* v. *Borradaile*, 10 Beav. 263; *Hartland* v. *Murrell*, 27 Beav. 204; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, C. A.

(*i*) Per Lord Cairns, L. C., in *Corser* v. *Cartwright*, L. R. 7 H. L. 731, at p. 736. See *Re Venn and Furze's Contract*, (1894) 2 Ch. 101; *Re Henson*, (1908) 2 Ch. 356; *post*, p. 427.

(*k*) *Re Bailey*, *Bailey* v. *Bailey*, 12 Ch. D. 268.

(*l*) *Warren* v. *Davis*, 2 My. & K. 49. See *Marshall* v. *Gingell*, 21 Ch. D. 790.

(*m*) *Harris* v. *Watkins*, Kay, 438.

trust for daughters; the real estate devised to the daughters was held not to be charged with the debts (*n*). These cases, as well as cases where real estate has been devised to a person on condition that he pay the debts (*o*), are treated by a learned author as amounting to a trust, and not to be a charge for payment of debts (*p*).

Specific charge.

Again, a contrary intention may be indicated by reason of there being an express charge of debts on a specific part of the real estate, so as to exonerate the residue of the real estate (*q*), but the specific charge must be clearly expressed (*r*).

Extent of general charge of debts.

A general charge of debts will charge specifically-devised real estate (*s*); but a charge of debts by the will, will not include lands specifically devised by a codicil (*t*).

What will amount to a charge of legacies.

ii.—Charge of Legacies.—As regards legacies, the intention to charge them upon real estate must appear very clearly by the will so as to enable the executors to sell or mortgage it for the purpose of paying the legacies (*u*). A mere general gift of legacies will not charge the real estate (*x*); and it seems very doubtful whether a general direction that legacies shall be paid, or a direction to the executors to pay them, coupled with a devise of realty to them, would charge the legacies on the real estate generally, or on the real estate so devised to them, either beneficially or in trust for other persons. The affirmative has been held in two cases (*y*), but has been dissented from in another case (*z*); the other cases usually cited in support of the proposition appear to have been cases where the direction to pay legacies was followed by a gift of the residue of real and personal estate.

(*n*) *Re Bailey*, *Bailey* v. *Bailey*, 12 Ch. D. 268.

(*o*) *Dillon* v. *Cruise*, 3 Ir. Eq. R. 70, 79; *Bridgman* v. *Dove*, 3 Atk. 201; *Dolton* v. *Hewen*, 6 Madd. 9; *Page* v. *Adam*, 4 Beav. 269; *Lockhart* v. *Hardy*, 9 Beav. 379.

(*p*) Will. Real Assets, pp. 44—48.

(*q*) *Palmer* v. *Graves*, 1 Keen, 545; *Corser* v. *Cartwright*, L. R. 7 H. L. 731.

(*r*) *Taylor* v. *Taylor*, 6 Sim. 246; *Jones* v. *Williams*, 1 Coll. 156. See *Wrigley* v. *Sykes*, 21 Beav. 337.

(*s*) *Maskell* v. *Farrington*, 3 De G. J. & S. 338; *Earl of Portarlington* v. *Damer*, 4 De G. J. & S. 161; *Mannox* v. *Greener*, L. R. 14 Eq. 456.

(*t*) *Wheeler* v. *Claydon*, 16 Beav. 169; *Quain* v. *Harvey*, 5 L. R. Ir. 622.

(*u*) *Bench* v. *Biles*, 4 Madd. 188. See *Bright* v. *Larcher*, 3 De G. & J. 148; *Field* v. *Peckett*, 29 Beav. 568.

(*x*) *Kightley* v. *Kightley*, 2 Ves. Jun. 328.

(*y*) *Alcock* v. *Sparhawk*, 2 Vern. 228; *Preston* v. *Preston*, 2 Jur. N. S. 210.

(*z*) *Parker* v. *Fearnley*, 2 S. & St. 592. See also *Re Cameron*, *Nixon* v. *Cameron*, 26 Ch. D. 19.

Direction to pay legacies.

Where a testator directs his executors to pay his debts, or the payment of his debts and legacies (*a*), or of legacies only (*b*), or if he merely gives legacies (*c*), and also devises and bequeaths the residue of his real and personal estate together, the result is to charge the debts or legacies upon the real estate, unless a contrary intention is indicated, as by an express direction that the payment shall be out of personal estate (*d*). But this rule will not apply where the realty and personalty are separately devised and bequeathed (*e*).

Extent of charge of legacies.

A general charge of legacies on real estate will not charge realty specifically devised (*f*), unless the charge extends also to the payment of debts (*g*), or unless the specific devises comprise the whole of the real estate (*h*).

Where legacies and annuities are charged on property and the Court sets apart a fund to answer them, it does not release the rest of the property which may be followed, unless an order has been made under s. 5 of Conveyancing Act, 1881 (*i*).

iii.—Charge of Annuities.—An annuity is a legacy (*k*); so, if legacies and annuities are given by a will, which contains a charge of debts and legacies on real estate, the annuities are charged on the real estate (*l*).

Annuities, whether charged on *corpus*.

Whether an annuity is charged on the *corpus*, so as to be raiseable by sale or mortgage thereof, or only on the rents and profits, does not depend upon any abstract rule of law, but upon the intention to be gathered from the instrument (*m*).

Cases where the annuity was not charged on *corpus*.

There is no charge on the *corpus* where an annuity is directed to be paid out of rents and profits, or out of interest without

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(*a*) *Greville* v. *Browne*, 7 H. L. C. 689; *Gainsford* v. *Dunn*, L. R. 17 Eq. 405; *Re Brooke*, *Brooke* v. *Brooke*, 3 Ch. D. 630; *Re Bailey*, *Bailey* v. *Bailey*, 12 Ch. D. 268, 274; *Elliott* v. *Dearsley*, 16 Ch. D. 327, C. A.; *Re Bawden*, *National Provincial Bank of England* v. *Cresswell*, (1894) 1 Ch. 693, 700; *Re Boards*, *Knight* v. *Knight*, (1895) 1 Ch. 499; *Re Adams and Perry*, (1899) 1 Ch. 554.

(*b*) *Cross* v. *Kennington*, 9 Beav. 150.

(*c*) *Elliot* v. *Hancock*, 2 Vern. 143; *Greville* v. *Browne*, *sup.*; *Re Bellis's Trusts*, 5 Ch. D. 504; *Re Dyson and Fowke*, (1896) 2 Ch. 720.

(*d*) See *Gyett* v. *Williams*, 2 J. & H. 429.

(*e*) *Bray* v. *Stephens*, 12 Ch. D. 162.

(*f*) *Spong* v. *Spong*, 3 Bli. N. S. 34; *Conron* v. *Conron*, L. R. 7 H. L. 168.

(*g*) *Maskell* v. *Farrington*, 3 De G. J. & S. 338.

(*h*) *Bank of Ireland* v. *McCarthy*, (1898) A. C. 181.

(*i*) *Re Evans and Bettell*, (1910) 2 Ch. 438.

(*k*) *Sibley* v. *Perry*, 7 Ves. 522; *Bromley* v. *Wright*, 7 Ha. 334; *Ward* v. *Grey*, 26 Beav. 485; *Gaskin* v. *Rogers*, L. R. 2 Eq. 284.

(*l*) *Heath* v. *Weston*, 3 De G. M. & G. 601.

(*m*) *Clifford* v. *Arundell*, 1 De G. F. & J. 307, 311.

more (*n*); nor if it is to be paid out of the annual rents and profits (*o*); but the deficiency of one year was made good out of the rents of subsequent years (*p*); nor is the *corpus* charged when the annuity is to be paid out of the rents and profits only during the life of the annuitant (*q*); nor where, after a direction to pay an annuity out of the rents, the surplus of the rents is disposed of (*r*); nor where it is to be paid out of the rents and profits, or "other moneys held upon the trust," the words "other moneys" meaning moneys "*ejusdem generis*" (*s*).

Question between tenant for life and remainderman.

A distinction is made where the question is raised, not between an annuitant and the residuary legatee, but between a tenant for life and remainderman (*t*), in which latter case the property is intended to be kept intact during the life of the annuitant to go to the remainderman (*u*).

When an annuity is given by will out of land, by way of legal rent-charge, with powers of distress and entry, and the estate is devised in settlement, the deficiency of the annual rents to answer the annuity will not, at least in the lifetime of the annuitant, be made good by a sale or mortgage of the estate, unless the Court finds it necessary to make a decree for the sale or mortgage for some other purpose, as for payment of debts (*x*). But *secus* where the annuitant is dead, and the estate is unsettled (*y*).

A power to recover annuities when in arrear by "distress and sale," as rents are recovered by law, is insufficient to charge the *corpus* (*z*).

If trustees are directed to lay out sufficient money to produce

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(*n*) *Earle* v. *Bellingham*, 24 Beav. 445; *Clifford* v. *Arundell*, *sup.*; *Miller* v. *Huddlestone*, 3 Mac. & G. 513; *Hindle* v. *Taylor*, 5 De G. M. & G. 577.

(*o*) *Forbes* v. *Richardson*, 11 Ha. 354; *Marsh* v. *Marsh*, 2 Jur. N. S. 348.

(*p*) *Ibid.*; *Anderson* v. *Anderson*, 33 Beav. 223.

(*q*) *Foster* v. *Smith*, 1 Ph. 629; *Earle* v. *Bellingham*, 24 Beav. 445. See *Phillips* v. *Gutteridge*, 3 De G. J. & Sm. 332.

(*r*) *Stelfox* v. *Sugden*, Johns. 234; *Clifford* v. *Arundell*, 1 De G. F. & J. 307; *Darbon* v. *Rickards*, 14 Sim. 537; *Sheppard* v. *Sheppard*, 32 Beav. 194.

(*s*) *Clifford* v. *Arundell*, *sup.*

(*t*) *Croly* v. *Weld*, 3 De G. M. & G. 993; *Baker* v. *Baker*, 6 H. L. C. 622; *Wright* v. *Callendar*, 2 De G. M. & G. 652.

(*u*) *Salvin* v. *Weston*, 35 L. J. Ch. 552; *Att.-Gen.* v. *Poulden*, 3 Ha. 555.

(*x*) *Graves* v. *Hicks*, 11 Sim. 551; *Philipps* v. *Philipps*, 8 Beav. 193.

(*y*) *Cupit* v. *Jackson*, 13 Pri. 721; McCl. 504.

(*z*) *Addecott* v. *Addecott*, 29 Beav. 460; *Lambert* v. *Turner*, 8 Jur. N. S. 1223; *Taylor* v. *Taylor*, L. R. 17 Eq. 324. It is to be observed that in the last-cited case the lands were devised subject to and charged with the annuities, a point which does not appear to have been taken into account by Hall, V.-C., and which renders the decision somewhat unsatisfactory. See the observations thereon of North, J., in *Re Tucker*, *Tucker* v. *Tucker*, (1893) 2 Ch. 323; and see *inf.*, p. 418.

an annuity, and the funds set apart fail, the deficiency will not be raised out of the capital (*a*), unless, upon the construction of the will, the intention appears to be that the capital is to be the fund liable to pay the annuity (*b*).

Where lands were devised to trustees in trust to receive the rents from time to time, and *thereout* to pay an annuity to A. for life, and *immediately* after his decease to convey to other persons in fee; it was held that, upon the death of the annuitant, a new trust arose, and accordingly, the arrears did not form a charge upon the rents and profits accruing after his death (*c*).

Cases where the annuity was charged on *corpus*.

The *corpus* is charged where the terms are "to levy and raise" the annuity out of the rents and profits (*d*), and also where, in addition to the direction to pay the annuity out of rents and profits, the estates are "devised subject to," or "charged with," or "after full payment and satisfaction of," or "on trust to pay thereout" (*e*).

Subject to an annuity.

Where an estate was devised in fee, "subject to an annuity," and the estate was sold for payment of debts, the annuitant was allowed to have recourse to the surplus capital, the income being insufficient (*f*), and a prospective order has been made for the sale from time to time of so much of the *corpus* as would, together with the income, be necessary for raising the amount of the annuity (*g*).

Where trustees were directed to take an annuity out of the real estate, and, without prejudice to the annuity and the powers of enforcing the same, to stand possessed of the real estate for others, this was held to be a charge on the fee (*h*).

When fund set apart.

Where a fund is directed to be set apart for payment of the annuity, and the income of the whole estate is insufficient to pay it, and the terms are such as to indicate an intention to charge the *corpus*, the arrears are made good out of *corpus* (*i*);

(*a*) *Baker* v. *Baker*, 6 H. L. C. 622, questioning *May* v. *Bennett*, 1 Russ. 370; *Michell* v. *Wilton*, L. R. 20 Eq. 269; *Turbottom* v. *Earle*, 11 W. R 680.

(*b*) *Mills* v. *Drewitt*, 20 Beav. 632.

(*c*) *Foster* v. *Smith*, 1 Ph. 629; *Darbon* v. *Rickards*, 14 Sim. 537.

(*d*) *Playfair* v. *Cooper*, 17 Beav. 187.

(*e*) *Haynes* v. *Haynes*, 3 De G. M. & G. 590; *Gratrix* v. *Chambers*, 7 Jur. N. S. 960; *Hickman* v. *Upsall*, 2 Giff. 124; *Birch* v. *Sherratt*, L. R. 2 Ch. 644; *Re Mason*, *Mason* v. *Robinson*, 8 Ch. D. 411; *Re Livesey*, *Baron* v. *Aspden*, W. N. (1883) 127.

(*f*) *Stamper* v. *Pickering*, 9 Sim. 176; *Exp. Wilkinson*, 3 De G. & Sm. 633; *Birch* v. *Sherratt*, *sup.*; *Miner* v. *Baldwin*, 1 Sm. & G. 522; *Picard* v. *Mitchell*, 14 Beav. 103.

(*g*) *Hodge* v. *Lewin*, 1 Beav. 431.

(*h*) *Miles* v. *Rowland*, W. N. (1881) 26.

(*i*) *Wright* v. *Callendar*, 2 De G. M.

but in such a case, too much weight must not be attached to the words "subject thereto" (*k*). Similarly, where a fund is set apart by the Court to meet an annuity, and the fund is deficient (*l*). If a fund is directed to be set apart for an annuity, and there is a gift of the entire residue and the part thereof so set apart, the *corpus* is charged (*m*). But the fact that a fund is set apart to answer an annuity does not release the rest of the property (*n*).

But if the annuity is given generally, a residuary gift following of "*all the remaining interests of my moneys*" has been held not to prevent the annuity being charged on the *corpus*(*o*). So, an intention expressed in the will of making up the failure of another fund, on which the annuity was charged, has been held to have the effect of charging the *corpus*, though the annuity was given only out of the dividends with a limitation over (*p*). So where annuities were charged by the will upon the capital as well as the interest of the moneys to be produced by the sale and conversion of the leasehold and personal estate, and the trustees were directed, if occasion should require, to provide for payment of the annuities out of the rents, issues, and profits of the real estate in aid of the personalty, the annuities being in arrear, it was held, that the arrears were to be raised by sale or mortgage out of the real estate (*q*).

Where the annuity was directed to be secured out of the leasehold, it was held to be a charge on the *corpus* (*r*), and when the terms used amount to a charge on the fund, the *corpus* can be resorted to (*s*).

How the charge of annuity made effectual.

Where the deficiency is to be made good out of *corpus*, the annuitant is not entitled to have the gross value paid out of capital on the principle of *Wroughton* v. *Colquhoun* (*t*), but is

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& G. 652; *Ingleman* v. *Worthington*, 25 L. J. Ch. 46; *Perkins* v. *Cooke*, 2 J. & H. 393; *Re Mason, Mason* v. *Robinson*, 8 Ch. D. 411; *Illsley* v. *Randall*, 53 L. J. Ch. 1161. A mortgage by an executor to secure arrears of an annuity belongs to the annuitant. See *Depree* v. *Bedborough*, 10 W. R. 875.

(*k*) *Michell* v. *Wilton*, L. R. 20 Eq. 269. See *Thornber* v. *Wilson*, 28 L. J. Ch. 145; *Ingleman* v. *Worthington*, 25 L. J. Ch. 46; *Re Mason*, 8 Ch. D. 411.

(*l*) *Commissioners of Charitable Donations* v. *St. Lawrence*, 3 J. & L. 561.

(*m*) *Carmichael* v. *Gee*, 5 App. Cas. 588.

(*n*) *Re Evans and Bettell*, *ante*, p. 416.

(*o*) *Wroughton* v. *Colquhoun*, 1 De G. & S. 36.

(*p*) *Boyd* v. *Buckle*, 10 Sim. 595.

(*q*) *Fentiman* v. *Fentiman*, 13 Sim. 171; 16 L. J. Ch. 436.

(*r*) *Howarth* v. *Rothwell*, 30 Beav. 516.

(*s*) *Hickman* v. *Upsall*, 2 Giff. 124; *Pearson* v. *Helliwell*, L. R. 18 Eq. 411.

(*t*) 1 De G. & S. 357.

entitled to have the accruing payments of the annuity made good, if necessary, out of the *corpus*, as in *Wright* v. *Callendar* (*u*).

If the annuity is charged on the residue, and an insufficient fund is set apart, the deficiency is still a charge on the rest of the residue (*x*). Where annuities are expressly charged on *corpus*, a provision for abatement in case the rents are insufficient to pay the annuities in full does not exonerate the *corpus* (*y*). Whether an annuity is charged on a life estate, or only on the income of the tenant for life as and when actually received, depends on the context of the will (*z*).

General rule.

iv.—Direction to raise Money out of Rents and Profits.—Lord Hardwicke, in *Green* v. *Belchier* (*a*), said that "in general, where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine it to the receipt of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by a liberal construction of these words, taken them to amount to a direction to sell."

Charge *primâ facie* created by direction to pay debts out of rents, &c.

A direction in a will to pay debts or legacies out of rents and profits *primâ facie* creates a charge on the *corpus* authorizing money to be raised for payment of the debts by sale or mortgage (*b*).

Effect of creating a trust to raise money.

Where a trust is created for the purpose of raising money out of rents and profits, if the trusts of the will require that a gross sum should at once be raised, the money will be raiseable out of the *corpus* of the estate itself by sale or mortgage (*c*).

In *Baines* v. *Dixon* (*d*), estates were devised to trustees and their heirs upon trust for payment of the testator's funeral expenses, debts, and legacies, as far as his personal estate should be deficient, and for raising maintenance, &c. for his children;

(*u*) 2 De G. M. & G. 652.

(*x*) *Bright* v. *Larcher*, 3 De G. & J. 148; *Davies* v. *Wattier*, 1 S. & St. 463; *Illsley* v. *Randall*, 53 L. J. Ch. 1161.

(*y*) *Pearson* v. *Helliwell*, L. R. 18 Eq. 411.

(*z*) *Mackie* v. *Mackie*, 5 Ha. 70.

(*a*) 1 Atk. 506. See also *Gibson* v. *Rogers*, Amb. 93; *Barnes* v. *Dixon*, 1 Ves. Sen. 42; *Lingard* v. *Earl of Derby*, 1 Bro. C. C. 311; *Allan* v. *Backhouse*, Jac. 631.

(*b*) *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591.

(*c*) *Bootle* v. *Blundell*, 1 Mer. 232; *Wilson* v. *Halliley*, 1 R. & My. 590; *Lord Londesborough* v. *Somerville*, 19 Beav. 295; *Metcalfe* v. *Hutchinson*, 1 Ch. D. 521; *Balfour* v. *Cooper*, 23 Ch. D. 472.

(*d*) 1 Ves. Sen. 41. See *Lingard* v. *Earl of Derby*, 1 Bro. C. C. 311.

and to convey to his eldest son, at twenty-three; and he directed the legacies to be paid after his debts were satisfied, as the rents should advance the same. Lord Hardwicke, on appeal, directed the debts to be raised by sale, and the legacies to be paid out of the annual profits.

Where charge is on settled lands.

Where a charge is on a settled estate, the Court, in determining whether the charge will be raised by sale or mortgage, will give greater weight to the wishes of the persons whose interests in the estate are immediate than to the wishes of the persons whose interests are more remote (*e*).

Cases where the rule does not apply.

In *Cooke* v. *Parsons* (*f*), Lord Nottingham thought that a direction in a will for payment of debts out of the "rents" (without saying "profits") was not sufficient whereon to ground a sale. And where a trust was created for payment of debts "by perception of rents and profits, or by leasing, or by mortgaging" to raise sufficient money for the payment of debts, it was held not to authorize a sale; if there had been a trust of the rents and profits, the term might have been sold (*g*). It may, apparently, be inferred that if "mortgaging" had not been expressly authorized, the words "perception of the rents and profits" would not have been held to authorize a mortgage. So, where money is to be raised "by and out of the rents and profits and by leasing for three lives or twenty-one years," or "out of the rents and profits or by sale of a moiety of the land," or "by rents and other ways and means, except a sale," or generally, where an authority is superadded less extensive than that of selling or mortgaging, the literal meaning of the words will be followed (*h*).

Again, it was held that a sale was not authorized where a testator, having given the rents of certain lands to his executors in trust therewith to raise and pay his debts, devised all his lands, subject to an annuity, to his sons, directing that they should not enter on the rents until all the debts should be paid (*i*).

Distinction where remainderman is tenant for life.

Though the Court will generally, in favour of creditors, consider a devise in trust for payment of debts out of rents and

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(*e*) *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591.

(*f*) Prec. Ch. 184. And see *Sir John Talbot* v. *Duke of Shrewsbury*, Gilb. Rep. Eq. 89.

(*g*) *Ridout* v. *Earl of Plymouth*, 2 Atk. 105.

(*h*) *Ivy* v. *Gilbert*, 2 P. Wms. 13; *Mills* v. *Banks*, 3 P. Wms. 1; *Hall* v. *Carter*, 2 Atk. 358; *Bennett* v. *Wyndham*, 23 Beav. 521.

(*i*) *Small* v. *Wing*, 5 Bro. P. C. 66. And see *Harper* v. *Munday*, 7 De G. M. & G. 369.

profits to be equivalent to a devise of the estate itself, so as to authorize a sale or mortgage thereof, where the remainderman is tenant in fee or in tail, and therefore liable to pay the debts, yet the case is different where the remainderman is tenant for life only; for then the question arises whether he is to pay the interest of the charge only, or whether he shall also pay the capital. This is strictly a question of intention to be collected from the language of the will with reference to the provisions contained in it (*k*). When the direction is alternative, as to raise money by sale or mortgage, or by perception of rents and profits, the meaning of the more general words will not be restricted (*l*).

Lord St. Leonards' Act.

v.—**Mortgages of Realty by Executors and Trustees under Lord St. Leonards' Act.**—The effect of the Law of Property Amendment Act, 1859 (*m*), commonly known as Lord St. Leonards' Act (now to a great extent superseded by the Land Transfer Act, 1897), may be shortly stated thus:—

Effect of the statute.

1. If a testator charges his real estate with debts, and devises all his estate therein to trustees, the trustees can give a title and receipt for the purchase-money (*n*).
2. The power extends to the trustees for the time being, however appointed (*o*).
3. If a testator charges his real estate with debts, and does not devise all his estate therein to trustees, the executor can, except in cases falling within sect. 18, give such title and receipt (*p*).
4. A mortgagee advancing money to an executor or trustee, where the will contains a charge of debts, &c., on realty, is not, as a general rule, bound to see to the application of the money advanced (*q*).

When executors could mortgage land under former law.

Under the old law, prior to Lord St. Leonards' Act, in order to enable the executors of a will to raise money by sale or mortgage of their testator's realty, it must have been given to them, either expressly or by necessary implication, by being

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(*k*) *Heneage* v. *Lord Andover*, 3 Y. & J. 260. See also *Wilson* v. *Halliley*, 1 R. & My. 590; *Playters* v. *Abbot*, 2 My. & K. 97.

(*l*) *Goodall* v. *Rivers*, Mosley, 395; *Hebblethwaite* v. *Cartwright*, Forr. 30; *Hall* v. *Carter*, 2 Atk. 355.

(*m*) 22 & 23 Vict. c. 35, ss. 14—18, 23.

(*n*) Sect. 14.

(*o*) Sect. 15.

(*p*) Sect. 16.

(*q*) Sect. 23.

made to pass through their hands in the execution of their office, by an express or implied charge for payment of debts or legacies (*r*).

The fact of there being a charge of debts on real estate devised to trustees did not enlarge their estate into a fee simple, so as to enable them to sell (*s*). But where the trustees were also executors, they were held to have the legal estate in fee, with power to sell for payment of debts (*t*). It is also clear that a charge of debts enabled the trustees and the executor together to sell or mortgage (*u*). And these cases were considered to involve the decision that it was the executor who was to sell, and not the devisee (*x*).

Where there was a charge of debts on real estate, which was devised to one for life, with contingent remainders over, a power of sale in the executor was implied (*y*).

The whole doctrine was founded upon the principle of carrying out most conveniently the intention of the testator. A charge of debts implies a power of sale or mortgage in someone, and the donee of the power is to be ascertained from the whole will (*z*).

Effect of Lord St. Leonards' Act where there is a devise to trustees.

Where there is a charge of debts or legacies express or implied, by sects. 14 and 15 of Lord St. Leonards' Act, if the will devises the testator's realty to trustees, then, in the absence of contrary intention expressed by the will, the trustees for the time being of the will have power to sell or mortgage the realty for payment of debts or legacies. Where, upon the construction of a will, it seemed doubtful whether the testator intended to vest his realty in his trustees, it was held that a direction to pay debts was sufficient to show that the intention was to devise the realty to the trustees in fee in trust for the beneficiaries (*a*).

Sect. 14 only applies where the testator devises the whole of his estate and interest to the trustees. It does not, therefore,

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(*r*) *Bentham* v. *Wiltshire*, 4 Madd. 44. See *Curtis* v. *Fullbrook*, 8 Ha. 25, 278; *Haydon* v. *Wood*, 8 Ha. 279.

(*s*) *Kenrick* v. *Lord Beauclerk*, 3 B. & P. 175; *Doe* v. *Ewart*, 7 A. & E. 636, 668; *Dean* v. *Mellor*, 5 T. R. 558.

(*t*) *Creaton* v. *Creaton*, 3 Sm. & G. 286; *Spence* v. *Spence*, 12 C. B. N. S. 199; *Marshall* v. *Gingell*, 21 Ch. D. 790.

(*u*) *Shaw* v. *Borrer*, 1 Keen, 559; *Ball* v. *Harris*, 8 Sim. 485; 4 My. & Cr. 264. See *Re Jones, Dutton* v. *Brookfield*, 59 L. J. Ch. 31.

(*x*) *Gosling* v. *Carter*, 1 Coll. 644, 649, 652.

(*y*) *Robinson* v. *Lowater*, 5 De G. M. & G. 272.

(*z*) *Eidsforth* v. *Armstead*, 2 K. & J. 333.

(*a*) *Re Brooke, Brooke* v. *Brooke*, (1894) 1 Ch. 43. See also Hawkins on Wills, 151, 152.

apply where the tenant for life takes the legal estate during his life (*b*).

Where the widow of a deceased partner, who was sole trustee and executrix of his will, concurred with the surviving partner in selling real estate forming part of the partnership property, it was held that, as executrix, she had power to sell and give an effectual receipt for the purchase-money, and as trustee, to convey the legal estate (*c*).

Effect where there is no devise in trust.

Where the real estate is not devised in trust, sect. 16, by giving to the executors the same power of raising money as is, by sects. 14, 15, given to devisees in trust, appears clearly to empower the executors raising money to convey to a mortgagee the legal estate in the mortgaged lands. Prior to the statute, some doubts were expressed on this point, but the better opinion would seem to be that, under a general charge of debts, the executors had such a power (*d*).

Whether administrator may mortgage land.

Independently of the statute, an administrator with the will annexed was never deemed to have an implied power to sell or mortgage the testator's realty by virtue of a charge of debts; and the expression in sect. 16, "persons in whom the executorship is for the time being vested," has been held not to include an administrator (*e*).

Effect of devise of land charged with debts to person not executor or trustee.

An executory devise is not a devise in fee or in tail within the meaning of s. 18, and therefore the executor has power to sell or mortgage the land. That section only applies where the devisee takes on the death of the testator (*f*).

Where there is a devise of the legal estate to a particular person, and the estate is charged with the payment of debts and legacies, it is clear that the money cannot be raised except through the instrumentality of the devisee, who is the only person who can make a legal title (*g*).

It has also been held that, though the statute 3 & 4 Will. IV. c. 104, makes real estate "assets to be administered in Courts of Equity" for payment of debts of the deceased, there is no lien or charge on the land until judgment for administration

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(*b*) *Re Adams and Perry*, (1899) 1 Ch. 554.

(*c*) *West of England, &c. Bank* v. *Murch*, 23 Ch. D. 138.

(*d*) *Colyer* v. *Finch*, 5 H. L. C. 905, at p. 922. See *Briggs* v. *Sharp*, L. R. 20 Eq. 317, 320.

(*e*) *Re Clay and Tetley*, 16 Ch. D. 3, C. A. See also Sug. Powers, 111; Farwell, Powers, 88, 96; and Shep. Touchst. by Preston, 417 a, note (*p*).

(*f*) *Re Barrow Corporation and Rawlinson*, (1903) 1 Ch. 339.

(*g*) *Colyer* v. *Finch*, 5 H. L. C. 905.

has been obtained by the creditors (*h*). Consequently a *bonâ fide* purchaser or mortgagee from the devisee is not liable to see to the application of the money (*i*). And in *Corser* v. *Cartwright* (*k*) the Court of Appeal laid it down as a general rule that the effect of a devise of real estate charged with debts or legacies is altogether to supersede any implied power which such a charge would otherwise give to the executors to sell or mortgage the real estate; but, on appeal to the House of Lords (*l*), all the learned lords pointed out that, in the case before them, the devisee was also an executor of the will, and, though the decision of the Court of Appeal was affirmed on that ground, Lord Cairns, C., expressly disclaimed giving any opinion as to the case of a person who is not an executor being devisee of an estate charged with payment of debts.

It is, therefore, apprehended that an intending mortgagee dealing with a devisee of real estate charged with debts or legacies, should either require the concurrence of the executor or should be careful to ascertain that the money is required for payment of the debts or legacies, and that it is applied for that purpose. If it is alleged that all debts and legacies have been paid, the mortgagee, before treating the borrower as an ordinary devisee, should satisfy himself that this is the case by such evidence as the case admits (*m*).

Exception of devises in fee or in tail.

The exception laid down in the concluding clause of sect. 18 does not apply where an estate is devised by way of settlement charged with debts or legacies, so that there is no individual or individuals who are able to make a good title to a mortgagee; in such a case, the executors have power to make a valid mortgage under sect. 16 of the Act (*n*).

Receipt of executor or trustee for moneys advanced.

The provision of sect. 23 of Lord St. Leonards' Act that a receipt of trustees or executors shall relieve purchasers and mortgagees from the obligation to see to the application of moneys paid, is still in force, but has been virtually superseded

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(*h*) *Re Moon*, (1907) 2 Ch. 304.

(*i*) *Kinderley* v. *Jervis*, 22 Beav. 1.

(*k*) L. R. 8 Ch. 971.

(*l*) *S. C.*, 7 H. L. 731, 737.

(*m*) It must be borne in mind that there can be no specific enforcement of an agreement to advance money, so that an intending mortgagee, unlike a purchaser, may make any requisitions he thinks fit, and is not bound to complete the transaction unless such requisitions are answered to his entire satisfaction.

(*n*) *Re Wilson*, *Pennington* v. *Payne*, 34 W. R. 512; *Re Barrow Corporation and Rawlinson*, (1903) 1 Ch. 339.

by sect. 20 of the Trustee Act, 1893 (*o*), which enacts as follows:—

Power of trustees to give receipts.

> "(1.) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.
>
> "(2.) This section applies to trusts created either before or after the commencement of this Act."

Fraud or collusion.

It has been seen that fraud or collusion on the part of the mortgagee, or the fact that he has actual or constructive notice of any impropriety attending the transaction, will deprive him of the statutory protection against liability to see to the application of the money advanced. On this principle, if an estate is devised subject to debts and legacies, a mortgagee advancing money to the devisee, although also the executor, is liable to the charge if the circumstances of the case afford intrinsic evidence, or it otherwise appear, that the mortgage money is not to be applied in payment of debts and legacies, but for the private purposes of the mortgagor (*p*).

Specific sums for debts.

It was held, under the former law, that if estates were devised charged with specific sums to the executors for payment of debts, a mortgagee was bound to see to the application of the mortgage money, notwithstanding releases had been executed to the devisees by the executors, but which did not show the charges to have been raised or paid (*q*). But the statutory power of trustees or executors now extends to sums payable to them, so as to exonerate the person paying the money from the liability.

Whether mortgagee is bound to inquire whether debts, &c. are paid.

In several cases decided before the Act (*r*), it was held that the implied power to sell by virtue of a charge of debts, exonerated a purchaser or mortgagee from inquiry as to whether the debts had been paid notwithstanding a very considerable lapse of time since the testator's death. It was, however, laid

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(*o*) 56 & 57 Vict. c. 53, s. 20.

(*p*) *Walker* v. *Taylor*, 8 Jur. N. S. 681, H. L.; *Corser* v. *Cartwright*, L. R. 7 H. L. 726; *West of England Bank* v. *Murch*, 23 Ch. D. 138.

(*q*) *Braithwaite* v. *Britain*, 1 Kee. 206.

(*r*) *Forbes* v. *Peacock*, 12 Sim. 528 (25 years); *Sabine* v. *Heape*, 27 Beav. 553 (27 years); *Wrigley* v. *Sykes*, 21 Beav. 337 (33 years).

down by the Court of Appeal that after a lapse of twenty years there is a presumption that the debts are paid; so that, after the twenty years have elapsed, a purchaser or mortgagee is bound to inquire whether the debts are paid; or, otherwise, he will be liable if the money is applied improperly for other purposes; but within that period he is not bound or entitled so to inquire (*s*).

Distinction in regard to leaseholds.

The rule, however, applies only to sales of realty, the right of an executor to dispose of which depends solely on a power implied by a charge of debts, &c., and does not apply to leaseholds which are vested in the executor in his character as such, giving him complete power to deal. An executor dealing with leaseholds or other personalty of his testator must, therefore, in the absence of evidence to the contrary, be presumed to have acted in the discharge of his duties as executor, and a purchaser or mortgagee is not bound or entitled, notwithstanding any lapse of time, to inquire whether the debts, &c. have been paid (*t*).

So an executor may validly pledge any part of the personal estate at any distance of time from the testator's death, and the pledgee is under no obligation to make inquiries (*u*).

But if the mortgagee or pledgee has actual notice that there are no debts and no reason is suggested for the mortgage, he will not be safe in lending (*x*). It is sufficient, however, if the mortgage is expressed to be made for the payment of legacies only (*y*).

Charge of debts and legacies.

It is settled that a general charge of debts and legacies, including annuities, on real estate, renders a purchaser or mortgagee from the devisee-executor safe from seeing to the application of the purchase or mortgage money so long as any part of the trust is unperformed, although the purchaser or mortgagee is aware that all the debts have been paid; the rule depending on the state of things at the testator's death, and being unaffected by a subsequent change of circumstances (*z*), or even by the fact that the mortgage money is expressed to be raised for the payment of legacies only (*a*).

(*s*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, 480, C. A.

(*t*) *Re Whistler*, 35 Ch. D. 561. See *Re Venn and Furze's Contract*, (1894) 2 Ch. 101.

(*u*) *Solomon* v. *Attenborough*, (1911) 2 Ch. 159, rev. on another point, (1912) 1 Ch. 451.

(*x*) *Re Verrell*, (1903) 1 Ch. 65.

(*y*) *Re Henson*, (1908) 2 Ch. 356.

(*z*) *Eland* v. *Eland*, 4 My. & Cr. 420; *Page* v. *Adam*, 4 Beav. 269; *Storey* v. *Walsh*, 18 Beav. 559.

(*a*) *Re Henson*, (1908) 2 Ch. 356.

A devisee-executor who mortgages the devised property will be presumed to be acting in the discharge of his duties as executor and not in respect of his beneficial interest, unless the contrary appears, which is not shown merely because the mortgage does not purport to be executed by him in the capacity of executor (*b*).

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SECTION III.

STATUTORY POWERS OF TRUSTEES TO RAISE MONEY FOR SPECIAL PURPOSES.

Power to raise money for exchange, &c.

i.—Mortgages of Settled Property.—By sect. 9 of Lord Cranworth's Act (*c*), trustees of settled lands were empowered to raise money for equality of exchange, and for renewals of leases for lives or for years, by mortgage of the hereditaments received in exchange or contained in the renewed lease (as the case might be), or of any hereditaments subject to the subsisting uses or trusts of the settlement, and to convey the hereditaments to be comprised in the security accordingly.

This enactment is now repealed by the Settled Land Act, 1882 (*d*), with a saving of rights accrued, or obligations incurred, and the validity and operation of instruments previously made. The repealed enactment, therefore, applies only to exchanges and renewals made between the 28th August, 1860, and the 31st December, 1882.

Powers of raising money for equality of exchange and other purposes are now given to tenants for life and other limited owners of settled lands, and to the trustees of the settlement, where the owners are infants, by the Settled Land Acts, 1882 and 1890 (*e*).

Renewal of leases.

As regards the renewal of leases, there was no statutory power to raise money for that purpose from the year 1882 until the 24th December, 1888, when the Trustee Act, 1888 (*f*), came into operation. By sect. 11 of that Act, which applied to trusts created as well before as after the passing thereof, the provi-

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(*b*) *Re Henson*, (1908) 2 Ch. 356.

(*c*) 23 & 24 Vict. c. 145, s. 9.

(*d*) 45 & 46 Vict. c. 38, s. 64, and Sched.

(*e*) *Ibid.*, ss. 18, 58, 59, 60; 53 & 54 Vict. c. 69, s. 11.

(*f*) 51 & 52 Vict. c. 59.

sions of the repealed enactment contained in Lord Cranworth's Act are virtually re-enacted.

Sect. 11 of the Trustee Act, 1888, has been in its turn repealed by the Trustee Act, 1893 (*g*), but re-enacted in similar terms.

It is to be observed that neither the repealed section nor the enactment now in force contains, as did Lord Cranworth's Act, an express power for the trustees raising money for renewals to convey or assure the hereditaments intended to be comprised in the security, so that it would seem that the only security they can give is by way of equitable charge upon the lands (*h*).

The effect of the above statutory enactments is merely to facilitate the renewal of leases of lands comprised in settlements, and not to alter any rule of law as between tenant for life and remainderman, with respect to the ultimate incidence of the expenses of renewal (*i*).

Estate duty.

By the Finance Act, 1894 (*k*), a person authorized or required to pay estate duty may, for the purpose of paying the duty, or recouping the amount of duty already paid by him, raise the amount of such duty and any interest and incidental expenses by sale or mortgage of, or a terminable charge on, the property to which the duty has attached. But a tenant for life, being bound to keep down interest on charges on the inheritance, is not, under ordinary circumstances, entitled to raise by mortgage the interest on the unpaid portion of the duty (*l*).

For the purpose of creating a mortgage or charge under this sub-section it is necessary to procure a certificate of charge under sect. 9 (2), and the lender ought to see to the application of the money.

In this sub-section estate duty apparently includes settlement estate duty (*m*).

It would seem that where the duty is paid by instalments under sect. 6 (8) the person paying it can on each occasion raise the money by a mortgage.

By sub-s. 6 (*n*) a person having a limited interest in any

(*g*) 56 & 57 Vict. c. 53, ss. 19, 51.

(*h*) *Re Baring, Jeune* v. *Baring*, (1893) 1 Ch. 61.

(*i*) *Ibid.* See also *Nightingale* v. *Lawson*, 1 Bro. C. C. 440.

(*k*) 57 & 58 Vict. c. 30, s. 9 (5).

(*l*) *Re Howe's Settled Estates*, (1903) 2 Ch. 69, C. A.

(*m*) *Re Laurie*, (1898) W. N. 136; 25 R. 636.

(*n*) 57 & 58 Vict. c. 30; *Mexborough* v. *Savile*, 88 L. T. 131.

property who pays the estate duty in respect of that property shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him.

Increment value duty.

By the Finance Act, 1910 (*o*), a tenant for life or trustee may create a charge by deed on the land for any money paid or which he may become liable to pay in respect of increment value duty or reversion duty, and the benefit of any such charge may be transferred in like manner as a mortgage.

A mortgagee liable to pay either of these duties may add the amount to his security, together with the costs incurred in respect of such payment of such duty (*p*).

The Charitable Trusts Act, 1853. Mortgage of charity estates for improvement.

ii.—Mortgages under the Charitable Trusts Acts.—The 16 & 17 Vict. c. 137, constituting the Charity Commission, empowered the commissioners sitting as a board (sect. 21) to authorize money to be raised by mortgage of charity estates for purposes of improvement, provided that compulsory provisions were reserved in every such mortgage for payment of the principal money borrowed by annual instalments, and for redemption and reconveyance within thirty years.

The Charitable Trusts Amendment Act, 1855.

Under 18 & 19 Vict. c. 124, s. 30, in lieu of such compulsory provisions being inserted in the mortgage, the board authorizing any mortgage is to give directions by its order for discharge of the principal debt, or any part thereof, by instalments, within thirty years, or for forming a sinking fund for discharge of the principal debt, or any part thereof, within the same period.

Powers of trustees only under Act.

By sect. 29 of the same Act, the trustees or administrators of any charity are disabled from borrowing money or from selling or mortgaging the charity estate otherwise than under an Act of Parliament or a Court of competent jurisdiction, or according to a scheme legally established, or with the approval of the Charity Commissioners (*q*).

Consent of commissioners.

It seems that the approval of the Charity Commissioners to a mortgage is not necessary where the land is held not upon any specific trust but upon trust for the general purposes of the

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(*o*) 10 Edw. VII. c. 8, s. 39 (1).

(*p*) *Ibid.* s. 39 (4).

(*q*) See *Re Mason's Orphanage*, (1896) 1 Ch. 596, C. A.; *Fell* v. *Official Trustee of Charity Lands*, (1898) 2 Ch. 44, C. A.

charity (*r*), nor where the land has been purchased out of a fund arising from voluntary subscriptions (*s*).

The Charity Act of 1860.

By 23 & 24 Vict. c. 136, s. 15, the power contained in sect. 21 of the Act of 1853, is extended so as to authorize the application of moneys raised on the securities of the properties of the charity, to any purpose or object which the board shall consider to be beneficial to the charity or the estate or objects thereof, and which shall not be inconsistent with the trusts or intentions of the foundation.

Power of majority of trustees.

By sect. 12 of the Act of 1869 (*t*), a majority of the trustees are empowered to execute all assurances, &c. requisite for carrying any mortgage into effect, on behalf of themselves and of their co-trustees, and also of the official trustee, in cases where his concurrence would otherwise be required (*u*).

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SECTION IV.

MORTGAGES BY TRUSTEES UNDER EXPRESS POWERS.

When express powers are required.

i.—Powers of Mortgaging in Settlements and Wills.— Express powers authorizing trustees to raise money for purposes connected with their trusts were formerly often inserted in settlements and wills, and are required at the present day if it is desired that money should be raised for purposes other than those of enfranchisement, exchange, or partition, or of discharge of incumbrances affecting settled lands (*x*), or of renewal of leases (*y*).

Discretion of trustees.

Where trustees have a discretionary power to sell or mortgage settled property, the Court will not enforce the exercise of the power, however beneficial its exercise may be (*z*).

(*r*) *Re Sons of Clergy Corp.*, (1893) 1 Ch. 178.

(*s*) *Re Clergy Orphan Corp.*, (1894) 3 Ch. 145. But see *Re Stockport Ragged School*, (1898) 2 Ch. 687.

(*t*) 32 & 33 Vict. c. 110. A majority of two-thirds of the trustees was formerly necessary. See 23 & 24 Vict. c. 136, s. 16 (repealed).

(*u*) As to when the concurrence of the official trustee is required, see 16 & 17 Vict. c. 137, ss. 47—50; and 18 & 19 Vict. c. 124, s. 30.

(*x*) As to the statutory powers of limited owners to raise money for enfranchisement, &c., see 45 & 46 Vict. c. 38, s. 18; and 53 & 54 Vict. c. 69, s. 11, *ante*, p. 391.

(*y*) *Supra*, p. 428.

(*z*) *Camden* v. *Murray*, 16 Ch. D. 161; *Tempest* v. *Lord Camoys*, 21 Ch. D. 571, C. A.

If there be a devise in trust, by mortgage or sale, to raise money for payment of debts, the trustees may proceed to raise the money without the sanction of a decree; for decrees do not give rights, but are only executions of the trust or power already subsisting (*a*).

If the power to mortgage is for payment of debts on a deficiency of personalty, there can be no mortgage after a decree proving that all debts are paid (*b*).

What will amount to power of mortgaging.

A power or trust to raise money by mortgage may be created by informal words (*c*). Estates are sometimes vested in trustees upon trust or with power to sell, without any express power to mortgage. It has been held that mortgage is *pro tanto* a sale, and that therefore a trust or power for sale will, generally speaking, include a mortgage (*d*); but the authority to mortgage must depend upon the nature of the trust. If the object of the trust is for a definite purpose, such as to raise a certain sum of money for debts, portions, and the like, without an ulterior intention of effecting an entire conversion into personalty by an absolute sale, there seems no objection to the money being in every case, where practicable, raised by mortgage. Questions of this sort must depend on the peculiar circumstances of the trust, and the intention of the parties as shown on the instrument (*e*).

Where a testator gave his real and personal estate to trustees upon trust for sale with a power of postponement and power during such postponement to manage and let the real estate and to make out of the income or capital of his real and personal estate any outlay necessary for improvements, repairs, &c., it was held that the trustees had power to raise money by mortgage or charge of the real estate for repairs (*f*).

Contrary intention.

A mortgage, however, would not be authorized under a trust for conversion out and out (*g*); nor where an intention appears that a complete conversion by sale should be effected (*h*).

(*a*) *Earl of Bath* v. *Earl of Bradford*, 2 Ves. Sen. 586. And see *Jones* v. *Price*, 11 Sim. 557.

(*b*) *Carlyon* v. *Truscott*, L. R. 20 Eq. 348.

(*c*) *Denyssen* v. *Bothey*, 8 W. R. 710.

(*d*) *Mills* v. *Banks*, 3 P. Wms. 9; *Earl of Orford* v. *Lord Albemarle*, 17 L. J. Ch. 396. See *Ball* v. *Harris*, 4 My. & Cr. 276.

(*e*) See *Binnie* v. *Broom*, 14 App. Ca. 576.

(*f*) *Re Bellinger*, *Durell* v. *B.*, (1898) 2 Ch. 534.

(*g*) *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; *Page* v. *Cooper*, 16 Beav. 396.

(*h*) *Holdenby* v. *Spofforth*, 1 Beav. 390.

Where land is directed to be sold by trustees, they have only a power, but no estate (*i*).

A power given by will to the executors and trustees thereof to wind up the testator's affairs, &c. and in so doing to make any "sales or other arrangements" as they should think fit, was held to empower the trustees to raise money by mortgage of the testator's real estate (*k*).

Where a testator devised and bequeathed all his property to trustees and directed them to carry on his business, and empowered them to increase or abridge the business and the capital thereof, it was held that, inasmuch as the trustees had power to sell the realty and use the proceeds so as to increase the business, they had power to mortgage the realty for that purpose (*l*).

Whether power to mortgage authorizes a sale.

Conversely, a sale is not, generally speaking, authorized by a power to raise money by mortgage (*m*). But where a tenant for life under a settlement had a general power to charge the estate to any amount, and by his will he directed the estate to be sold, a sale was decreed pursuant to this direction (*n*). And a power to raise money "by mortgage or otherwise" will authorize a sale (*o*). It is doubtful whether, under a trust to raise money by sale or mortgage, trustees can make a sale after having raised the money required by mortgage; at all events, the mortgagee cannot compel the trustees to sell (*p*).

Power to "raise" money.

A power to "raise" a sum of money has been held to authorize a sale, and could apparently enable the donee of the power also to mortgage (*q*). So a power of sale for raising a particular charge (*r*), or to pay debts (*s*), implies power to mortgage.

Power to charge.

A general power to charge will authorize an appointment of the fee to secure the money raised (*t*); but it would seem that a particular power of charging does not enable the donee of the power to appoint the fee by way of mortgage, but only enables him to create an equitable charge (*u*).

(*i*) *Elliott* v. *Fisher*, 12 Sim. 505; *Thompson* v. *Todd*, 15 Ir. Ch. R. 337.

(*k*) *Re Jones, Dutton* v. *Brookfield*, 59 L. J. Ch. 31.

(*l*) *Re Dimmock, Dimmock* v. *Dimmock*, 52 L. T. 494. See *Redman* v. *Rymers*, 65 L. T. 270.

(*m*) *Ridout* v. *Earl of Plymouth*, 2 Atk. 104.

(*n*) *Long* v. *Long*, 5 Ves. 445.

(*o*) *Tasker* v. *Small*, 6 Sim. 625; affd. on other points, 3 My. & Cr. 63.

(*p*) *Falk* v. *Lord Clinton*, 12 Ves. 56.

(*q*) *Wareham* v. *Brown*, 2 Vern. 153; *Bateman* v. *Bateman*, 1 Atk. 421.

(*r*) *Walker* v. *Southall*, 56 L. T. 882.

(*s*) *Ball* v. *Harris*, 4 M. & C. 267.

(*t*) *Long* v. *Long*, 5 Ves. 445; *Bateman* v. *Bateman*, *sup.*; *Drake* v. *Whitmore*, 5 De G. & S. 619.

(*u*) *Jenkins* v. *Keymis*, 1 Ch. Ca. 103.

General power of appointment.

Conversely, a power to appoint the fee will authorize a charge which the Court will, as a general rule, carry into effect by a sale (*x*). In such a case, the Court may authorize an appointment to trustees in trust for sale (*y*).

In one case, a power to charge with a sum of money was held to authorize the grant of a rent-charge until the principal and interest were paid (*z*); but the case was a very special one.

Fines for renewal, when raiseable out of rents, &c.

Upon the general principle elsewhere referred to (*a*), that a direction to raise money out of rents and profits for a purpose which requires a gross sum to be raised at once, will charge the *corpus* of the estate, fines for the renewal of leases for lives and upon taking admittance to copyholds, may be raised (*b*) out of the estate itself, although the rents and profits be the only specified fund. Where there is a power to raise fines out of annual rents and profits, with power to mortgage in case the necessary sums shall not be provided in that manner, the fines will be payable out of the income if it be sufficient (*c*). But where the power is simply to raise the fines out of the rents or by mortgage, if the trustees refuse to exercise their discretion as to the mode of raising the money, the Court, in pursuance of its general principles, will so raise it as to throw the burden upon the parties in proportion to their interests in the property charged; although it seems the trustees, in the exercise of their power, might have made a different disposition (*d*).

Trustees' receipts.

It has been seen that the receipt of trustees for moneys advanced to them will generally exonerate the mortgagee from seeing to the application of the money (*e*); but fraud or collusion on his part, enabling the trustees to apply the money to their own purposes, will vitiate the mortgage (*f*).

Interest.

A power to charge an estate with a specific sum of money without mentioning interest, includes a power to charge with interest (*g*); and the interest may be at any rate fixed by the

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(*x*) *Roberts* v. *Dixall*, 3 Eq. Ca. Ab. 668. And see *Palmer* v. *Wheeler*, 2 Ba. & Be. 18; *Skelton* v. *Flanagan*, Ir. R. 1 Eq. 362.

(*y*) *Kenworthy* v. *Bate*, 6 Ves. 793.

(*z*) *Blake* v. *Marnell*, 2 Ba. & Be. 35.

(*a*) *Ante*, p. 420.

(*b*) *Allan* v. *Backhouse*, 2 V. & B. 65; *Playlers* v. *Abbott*, 2 My & K. 97; *Garmstone* v. *Gaunt*, 9 Jur. 78.

(*c*) *Solley* v. *Wood*, 29 Beav. 482.

(*d*) *Jones* v. *Jones*, 5 Ha. 440; *Ainslie* v. *Harcourt*, 28 Beav. 313.

(*e*) 22 & 23 Vict. c. 35, s. 23; 56 & 57 Vict. c. 53, s. 20; *ante*, p. 426.

(*f*) *Burt* v. *Truman*, 6 Jur. N. S. 721.

(*g*) *Kilmurry* v. *Geery*, 2 Salk. 538; *Boycot* v. *Cotton*, 1 Atk. 556; *Evelyn* v. *Evelyn*, 2 P. Wms. 659; *Hall* v. *Carter*, 3 Atk. 359; *Lewis* v. *Freke*, 2 Ves. Jun.

donee of the power, who is not limited to the rate of interest allowed by the Court (*h*). But this rule does not apply where the trustees have not a discretionary power to charge, but an imperative trust to raise a sum of money for specific purposes; in such a case, the interest must not exceed the rate of 4 per cent., or, in the case of Irish estates, of 5 per cent. (*i*).

Costs.

Where trustees have power to raise a sum of money, they have power also to raise the costs of the mortgage (*k*).

Where real estate subject to several incumbrances was conveyed to trustees in trust to raise 75,000*l.* to pay off the incumbrances prior to a mortgage to A., who paid off and took transfers of the prior incumbrances; the trustees then, by a deed to which the mortgagor was a party, purported to assign to A. the 75,000*l.* raiseable under the trust deed, and to convey to him the property by way of mortgage to secure 75,000*l.* and interest; it was held that this was not a mortgage under the trust, and that, as against mesne incumbrancers, A. could only stand as a transferee of the incumbrances transferred to the extent of the security thereby created (*l*).

Covenant to pay.

ii.—Form of Mortgage by Trustees.—A covenant to pay in a mortgage by trustees is unusual (*m*). There should, however, be a proviso charging interest after default, and also a proviso that the trustees shall not be personally liable. But if the trustees enter into a covenant for payment, the last-named proviso would be void for repugnancy, so as to make the trustees liable on the covenant (*n*). The proviso being repugnant must be rejected, and the personal liability therefore remains (*o*).

Power of sale.

It may now be considered settled that a power to trustees or others to mortgage authorizes a mortgage with power of sale (*p*), in opposition to former authorities (*q*), and executors when

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507. See *Re Drax*, (1903) 1 Ch. 781, C. A.

(*h*) *Lewis* v. *Freke*, *sup.*

(*i*) *Balfour* v. *Cooper*, 23 Ch. D. 473, C. A., distinguishing *Young* v. *Lord Waterpark*, 13 Sim. 199.

(*k*) *Armstrong* v. *Armstrong*, L. R. 18 Eq. 541; *Nightingale* v. *Reynolds*, (1902) 2 Ch. 117. See *Sewell* v. *Bishopp*, 62 L. J. Ch. 985, C. A.

(*l*) *Thompson* v. *Hudson*, L. R. 2 Ch. 255, reversed on other grounds, L. R. 4 H. L. 2.

(*m*) See *Stroughill* v. *Anstey*, 1 De G. M. & G. 635, at p. 642.

(*n*) Key & Elph. 7th ed. vol. ii. p. 33.

(*o*) *Watling* v. *Lewis*, (1911) 1 Ch. 414; but see *Re Robinson*, (1912) 1 Ch. 717.

(*p*) *Bailey* v. *Abraham*, 14 L. T. 219; *Bridges* v. *Longman*, 24 Beav. 27; *Cook* v. *Dawson*. 29 Beav. 128; *Re Chawner's Will*, L. R. 8 Eq. 569. See *Bennett* v. *Wyndham*, 4 De G. F. & J. 259.

(*q*) *Clarke* v. *The Royal Panopticon*, 4 Drew. 26; *Sanders* v. *Richards*, 2 Coll. 568.

mortgaging to pay debts, &c., have the same right (*r*). It is safer, however, that trustees to whom power to mortgage is given, should be authorized in terms to give a power of sale (*s*). But the power of sale in the Conveyancing Act, 1881, s. 19, may be relied on, and will apply unless the trustees expressly exclude it, which they are not bound to do (*t*).

Where money is directed by the Court to be raised by mortgage, a power of sale has been sometimes inserted (*u*), and sometimes refused (*x*). The plan has sometimes been to give a power of sale with a proviso that it shall not be exercised during the infancy or other disability of the persons entitled subject to the mortgage, without the leave of the Court (*y*).

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SECTION V.

MORTGAGES UNDER TRUST TERMS FOR PORTIONS AND MAINTENANCE.

Powers to raise portions by mortgage, &c.

i.– At what Time Portions are raiseable.—In modern settlements and wills where portions are intended to be provided, the trustees are usually empowered, after the deaths of the tenants for life, or in their lifetime if they shall direct, to raise any part of the portions for the advancement of the children, and, after the deaths of the tenants for life and until the portions are payable, to raise certain sums for maintenance, not exceeding the amount of interest on the principal of the portion, with a proviso that the trustees shall not mortgage or sell until some one of the portions becomes payable.

General rule.

The general rule is, that when portions are by will or settlement vested, and directed to be paid at a given time, and raised by sale or mortgage of a term, they shall be raiseable at such time out of the term, though reversionary, unless an intention is shown on the will or settlement that the payment shall be postponed until the term comes into possession (*z*). The portions

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(*r*) *Russell* v. *Plaice*, 18 Beav. 21; *Cruikshank* v. *Duffin*, L. R. 13 Eq. 555.

(*s*) Dav. Conv. 4th ed. vol. ii. pt. 2, p. 85.

(*t*) See sect. 66 of the Act.

(*u*) *Selby* v. *Cooling*, 23 Beav. 418.

(*x*) *Drake* v. *Whitmore*, 19 L. T. 243.

(*y*) 2 Dav. Conv. 3rd ed. p. 635; 4th ed. p. 86.

(*z*) *Staniforth* v. *Staniforth*, 2 Vern.

are thus raiseable in the parents' lifetime, though the term is not to commence till after their death, or their death without issue male (as the case may be). If all the contingencies have happened, the portions must be raised, notwithstanding the injury to the remainderman by the sale or mortgage of the term (*a*); *secus*, if all the contingencies have not happened (*b*).

The tenant for life can only displace such charges before the portions have been actually raised, not after (*c*).

Contrary intention.

A contrary intention has been considered to be shown by a direction to raise the portions "after the commencement of the term" (*d*), or where maintenance is directed to be raised out of the rents and profits after the term has fallen into possession (*e*); it being conceived to be inconsistent to raise the portions before, and the maintenance after, the commencement of the term (*f*); but the apparent inconsistency of such direction as to maintenance does not prevent the operation of the rule in the face of a clear and express declaration (*g*).

A contrary intention has also been considered to be shown by an option to the trustees to raise the portions either out of the rents and profits, or by sale or mortgage of the term; but the better opinion is, that the exercise of the option by the trustees shall not be allowed to prejudice the right to the immediate raising of the portions (*h*). The circumstance also of the settlement providing that the children should out of the premises receive a yearly sum for maintenance, and that the residue of the rents should in the meantime, until the portions became payable, be received by the persons entitled to the reversion immediately expectant on the term, has been thought a sufficient indication of the intention to take the case out of the general rule (*i*). So, where there was a proviso in the settlement, making the portion contingent during the father's lifetime, and

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460; *Sandys* v. *Sandys*, 1 P. Wms. 707; *Goodall* v. *Rivers*, Mose. 395; *Michell* v. *Michell*, 4 Beav. 549; *Hall* v. *Carter*, 2 Atk. 355; *Smith* v. *Evans*, Amb. 633; *Conway* v. *Conway*, 3 Bro. C. C. 267, explained in *Codrington* v. *Foley*, 6 Ves. 363, at pp. 379, 380.

(*a*) *Hebblethwaite* v. *Cartwright*, Forr. 30; *Codrington* v. *Foley*, 6 Ves. 363; *Smyth* v. *Foley*, 3 Y. & C. Ex. 142.

(*b*) *Corbett* v. *Maidwell*, 1 Salk. 158; 3 Rep. in Ch. 101.

(*c*) *Ante*, p. 402.

(*d*) *Butler* v. *Duncomb*, 1 P. Wms. 448; *Churchman* v. *Harvey*, Amb. 335.

(*e*) *Brome* v. *Berkley*, 2 P. Wms. 484; *Stevens* v. *Dethick*, 3 Atk. 39.

(*f*) *Brome* v. *Berkley*, *sup.*

(*g*) *Lyon* v. *Chandos*, 3 Atk. 416.

(*h*) *Hebblethwaite* v. *Cartwright*, Forr. 30; *Hall* v. *Carter*, 2 Atk. 355.

(*i*) *Stevens* v. *Dethick*, 3 Atk. 39; *Smyth* v. *Foley*, 3 Y. & C. Ex. 142. But see *Michell* v. *Michell*, 4 Beav. 495.

the father had a power of revocation (*k*). If a parent, who is tenant for life, with remainder to trustees, of a term for raising portions, has a power of appointing the portions, they cannot be raised in the parent's lifetime (*l*).

Maintenance for children of first marriage.

Under a trust for raising portions and maintenance, the Court will not direct maintenance to be raised on the portion of a child of a first marriage during the life of a second wife, although she takes no estate, if the words of the trust are clearly opposed to it (*m*).

Interest.

Portions carry interest, though not mentioned, as from the time when they ought to be raised and paid (*n*), but not before that time (*o*). Accordingly, if a portion is directed to be raised out of rents and profits, and no time is appointed for raising the portion, only the bare sum required, without interest, must be raised, and any mortgage of the trust term for the purpose of raising the portion will be void (*p*).

Costs.

Trustees empowered to raise money for portions have an implied power to raise the incidental costs of a mortgage (*q*).

Where there is express power all the portions may be raised as soon as one becomes payable (*r*). In the exercise of a discretion on this point, the trustees should consider, on the one hand, how far the loss by infant portionists of the security of the term until their portions are raised is an objection to raising the entire sum at once (*s*); and, on the other hand, that the raising of each portion as it becomes payable by a separate mortgage may cause considerable expense to the estate (*t*).

But in the absence of an express power it is doubtful whether the whole sum can be raised by one mortgage at a time when some of the portionists are infants or only contingently entitled (*u*).

(*k*) *Reresby* v. *Newland*, 2 P. Wms. 94.

(*l*) *Wynter* v. *Bold*, 1 S. & St. 507.

(*m*) *Hume* v. *Rundell*, 2 S. & St. 174. But *quære*, the construction of the trust.

(*n*) *Evelyn* v. *Evelyn*, 2 P. Wms. 659, at p. 669; *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. Sen. 472, at p. 487; *Daly* v. *French*, 6 B. P. C. by Toml. 55; *Codrington* v. *Foley*, 6 Ves. 364. See *Hall* v. *Carter*, 2 Atk. 355, at p. 358.

(*o*) *Churchman* v. *Harvey*, Amb. 335, at p. 342; *Reynolds* v. *Meyrick*, 1 Ed. 48.

(*p*) *Ivy* v. *Gilbert*, 2 P. Wms. 13. See *Green* v. *Belchier*, 1 Atk. 505.

(*q*) *Armstrong* v. *Armstrong*, L. R. 18 Eq. 541; *Nightingale* v. *Reynolds*, (1903) 2 Ch. 236, C. A.

(*r*) *Gillibrand* v. *Goold*, 5 Sim. 155.

(*s*) *Wynter* v. *Bold*, 1 S. & St. 510; *Sheppard* v. *Wilson*, 4 Ha. 392, at p. 394.

(*t*) *Otway-Cave* v. *Otway*, L. R. 2 Eq. 725. See *Gillibrand* v. *Goold*, 5 Sim. 149.

(*u*) *Leich* v. *Leich*, 2 Dr. & War. 568.

Priority.

Where portions are raised at different times, the first raised portion has no priority. And where a portion is raised by a legal mortgage of the whole estate, such mortgage is not entitled to priority over a portion which is not yet raiseable, and which is merely an equitable charge under the will (*x*).

In a recent case it was held on the facts that a power to raise portions was not released by the tenant for life joining in a mortgage of the settled land, and that therefore portions subsequently charged under the power had priority over the mortgage (*y*).

ii.—Methods of raising Portions or Maintenance.—If a settlement or will contains a charge of portions, without specifying in what manner the money required is to be raised, a mortgage may be made for that purpose under the direction of the Court, as in the case of any other charge (*z*); but where the trusts of the term prescribe a particular method for raising the portions, this implies a negative that they shall not be raised in any other way (*a*).

Modern settlements usually contain an express direction that the portions may be raised by (among other means) mortgage of all or any of the settled lands and hereditaments for the whole or any part of the term. In the absence of such direction, the power of the trustees of the term to raise money for portions by means of a mortgage is a question of intention to be collected from the context of the settlement or will (*b*).

The general question as to whether and under what circumstances a direction to raise money out of rents and profits will authorize a mortgage out of the *corpus* of the estate has been already considered (*c*). This question is now reverted to with special reference to its application to raising money for portions.

It would seem that, according to modern decisions, the natural or ordinary meaning of raising a portion by rents and profits, is by the *yearly* profits (*d*), and the cases which have

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(*x*) *Nightingale* v. *Reynolds*, (1903) 2 Ch. 236, C. A.

(*y*) *Nottidge* v. *Dering*, (1910) 1 Ch. 297.

(*z*) See Dav. Conv. 3rd ed. vol. iii. p. 447.

(*a*) *Ivy* v. *Gilbert*, 2 P. Wms. 12, at p. 19; *Nightingale* v. *Reynolds*, *sup.* See *Davies* v. *Wescomb*, 2 Sim. 425.

(*b*) See *Wilson* v. *Halliley*, 1 R. & My. 590, at p. 599.

(*c*) *Ante*, p. 420.

(*d*) *Ivy* v. *Gilbert*, 2 P. Wms. 13; *Phillips* v. *Phillips*, 8 Beav. 193; *Foster* extended it further are *exceptions* out of the general rule, in which the context has afforded a different construction (*e*). Thus, where a time certain is prefixed for the payment of portions, and it is evident that the annual profits will not raise the money within that time, the Court has directed a mortgage (*f*). So, also, where the trust of a term was out of the rents and profits to raise daughters' portions, to be paid to them "as soon as conveniently could be," it was decreed, that the portions should be raised by sale or mortgage, and should carry interest from the death of their father (*g*). The principle applies where the sum is immediately raiseable—a gross sum that must be raised (*h*).

But equity would not raise the portions by mortgage, if the children were of tender years at the death of the father (*i*); and in such case the portions would have become due when the rents would have raised them, and would have carried no interest; as soon as the portions could have been raised by the rents, the land would have borne its burden and have been discharged (*k*).

If the trust be to raise portions out of rents and profits, no time being appointed for payment, and the child dies under twenty-one and unmarried before it is raised, the portion will, in such case, be raised out of the annual rents, for the Court will not, it seems, direct a mortgage (*l*).

Trust to raise annual sum for maintenance.

Where an annual sum is directed to be raised for maintenance, and there is an existing life estate, and it is not clearly expressed that the maintenance is not to commence until after the determination of that estate, the question of intention arises as in the case of the portion itself. If it is ascertained to be the intention that the maintenance shall commence notwithstanding the life estate, but the payment of it is clearly confined to be out of annual profits, it must from necessity either encroach on

v. *Smith*, 1 Ph. 629; *Shaftesbury* v. *Marlborough*, 2 My. & K. 111; *Darbon* v. *Rickards*, 14 Sim. 537.

(*e*) 2 P. Wms. 19; *Allan* v. *Backhouse*, 2 V. & B. 65; *Garmistone* v. *Gaunt*, 9 Jur. 78.

(*f*) *Backhouse* v. *Middleton*, 1 Ch. Ca. 173; *Heycock* v. *Heycock*, 1 Vern. 256; *Berry* v. *Askham*, 2 Vern. 26; *Warburton* v. *Warburton*, 2 Vern. 420; *Okeden* v. *Okeden*, 1 Atk. 552; *Green* v. *Belchier*, 1 Atk. 505; *Shrewsbury* v. *Shrewsbury*, 1 Ves. J. 234. And see 2 Ves. J. 481, n.; and *Allan* v. *Backhouse*, 3 V. & B. 65; *Wilson* v. *Halliley*, 1 R. & My. 590.

(*g*) *Trafford* v. *Ashton*, 1 P. Wms. 416. And see *Stanhope* v. *Thacker*, Prec. Ch. 435.

(*h*) *Metcalfe* v. *Hutchinson*, 1 Ch. D. 598. And see *Balfour* v. *Cooper*, 23 Ch. D. 472, C. A.

(*i*) *Evelyn* v. *Evelyn*, 2 P. Wms. 659.

(*k*) *Ivy* v. *Gilbert*, 2 P. Wms. 12.

(*l*) *Earl Rivers* v. *Earl of Derby*, 2 Vern. 72. See *Evelyn* v. *Evelyn*, 2 P. Wms. at p. 672.

the life estate, or run in arrear; the former can never be considered the intention, as the term is reversionary to the estate: the maintenance must therefore run in arrear, and when the trust term falls into possession, all the arrears must be paid (*m*). If the trusts for raising the portion and maintenance are extended to sale or mortgage, it was for some time considered doubtful whether the Court would raise the maintenance by way of mortgage; but in *Ravenhill* v. *Dansey* (*m*), Lord Chancellor Macclesfield considered it clear, that when the child had no other maintenance, it had been decreed to be raised by mortgage of the reversionary interest of the term; and (*n*), where the term was not reversionary, but the trust was to raise the portion on the death of the jointress, who had a rent-charge, the Master of the Rolls gave maintenance during the life of the widow, and seemed to be inclined to think, that even if the trust had been reversionary, maintenance might, if necessary, have been raised by sale or mortgage (*n*).

Maintenance.

Where an infant entitled in possession to real estate had no other means of maintenance than the rents, which were insufficient, an order was made that an allowance for his past maintenance should be charged upon, or raised out of, the *corpus* of the estate (*o*). But in subsequent cases this decision was disapproved of, and the Court refused to make orders for maintenance out of *corpus*, where infants were entitled in remainder (*p*).

At any rate, with regard to an estate tail and even an estate tail in possession, it is not possible under any jurisdiction of the Court to mortgage it even for securing past maintenance, and *à fortiori* not for future maintenance (*q*).

Estate duty on portions.

In raising portions by mortgage, the trustees should take care that the legacy and estate duty either be paid by the portionist, or deducted in ascertaining the amount secured by the mortgage, as the trustees are liable for the duty (*r*), as well as the devisees of the estate subject to the portions whether in fee or for life (*s*). But the trustee or devisee paying the legacy duty

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(*m*) *Ravenhill* v. *Dansey*, 2 P. Wms. 179.

(*n*) *Lyddon* v. *Lyddon*, 14 Ves. 558, at p. 566. See also *Milltown* v. *French*, 4 Cl. & Fin. 276; *Freeman* v. *Simpson*, 6 Sim. 75; *Clinton* v. *Seymour*, 4 Ves. 440.

(*o*) *Re Haworth*, L. R. 8 Ch. 415.

(*p*) *Re Hamilton*, 31 Ch. D. 291, C. A.; *Cadman* v. *Cadman*, 33 Ch. D. 397, C. A.

(*q*) *Re Hambrough*, (1909) 2 Ch. 620.

(*r*) 45 Geo. III. c. 28, s. 5; 57 & 58 Vict. c. 30, s. 8 (4).

(*s*) *Att.-Gen.* v. *Jackson*, 1 Cr. & J. 101.

can recover it from the portionist (*t*), unless the portions were devised clear of all deductions (*u*). And trustees may raise the amount of estate duty payable or paid by them in respect of portions by sale or mortgage of the term (*x*).

The duty will be recoverable by the person who pays it when the portions vest (*y*). If the portions have vested, but the portioners being infants, the personal remedy given by sect. 14 of the Finance Act, 1894, is not available, recourse can be had to the powers of sale and mortgage given by sect. 9 (5).

Form where mortgage is simply under the power.

iii.—Form of Mortgage for raising Portions, &c.—Where, as is often the case, the precise manner in which portions are to be raised by mortgage is prescribed by the instrument creating the trust, a mortgage made solely in exercise of the power for that purpose must strictly conform to the terms of the power. If the mortgage is made under the power without the concurrence of the tenant for life or other owner of the settled lands subject to the charge of portions, either by reason of his being a minor or unwilling to concur, or from a wish not to let in subsequent incumbrances, it is obvious that, inasmuch as trustees do not usually enter into covenants for payment of principal or interest (*z*), the land will be the only security available to a mortgagee advancing money for raising portions. It is also to be remarked, that though trustees generally may give to a mortgagee a power of sale though not expressly authorized so to do (*a*), trustees of portion-terms secured on large family estates, often refuse to give such a power (*b*).

But these considerations seldom deter intending mortgagees from advancing money for raising portions, as the amount raiseable for that purpose is generally inconsiderable in proportion to the value of the land charged, so that the land alone is a sufficient security for the amount raised. Moreover, such mortgages offer the advantage, especially to trustees advancing money, that they afford an investment which is likely to be permanent, as well as amply secured.

(*t*) *Hales* v. *Freeman*, 1 Br. & B. 391.

(*u*) *Stow* v. *Davenport*, 5 B. & Ad. 359.

(*x*) 57 & 58 Vict. c. 30, s. 9 (5).

(*y*) 52 Vict. c. 7, s. 14.

(*z*) See *ante*, p. 435.

(*a*) See *ante*, p. 435.

(*b*) Of course, if it is intended that the mortgagee shall not have a power of sale, the provisions of s. 19 of the Conveyancing Act, 1881, must be expressly excluded.

Form where owner in fee or for life, &c. concurs.

If, however, the tenant for life or other owner of the estate is able and willing to concur in the mortgage deed, the mortgage need not be made in exercise of the power, but may be made in any manner the parties please; for the owner, if seised in fee, can obviously raise the money in any way he thinks convenient, and on receipt of the portions by the persons entitled thereto, the charge and the term will cease and determine. And, if the owner is only a tenant for life or other limited owner, then, inasmuch as the portions though not actually raised are an "incumbrance" on the property, he can, under his statutory power (*c*), mortgage the settled lands or any part thereof by a conveyance of the fee or by demise, as he thinks most convenient for the purpose of extinguishing the charge.

The most usual form which a mortgage for raising portions appears to take, where the owner of the estate concurs, is that of a mortgage by the trustees of the term to the person advancing the money, with a covenant by the owner of the estate for keeping down the interest, sometimes extending also to the payment of the principal; the money raised being paid, by the direction of the trustees, to the portionist who joins for the purpose of acknowledging the receipt of the money (*d*). The concurrence of the portionist, though usual and convenient, is not essential, and may often be safely dispensed with.

Sometimes the manner adopted for raising a portion by mortgage is, that the portionist shall assign to the mortgagee his share of the sums to be raised, and give the mortgagee a power of attorney to receive it: then the tenant for life, if the term is reversionary, makes a demise of a proportional part of the estate to the mortgagee for ninety-nine years, if the tenant for life shall so long live, upon trust to permit the tenant for life to receive the rents until default is made in payment of the interest, and then to receive the rents and retain the interest. The trustees of the term assign a proportional part of the premises comprised in the term to the mortgagee, and there is introduced a proviso for redemption by the tenant for life, or persons in remainder, on payment of the portion and costs, &c. The tenant for life, or (if the term is in possession) the re-

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(*c*) See the Settled Land Act, 1890, s. 11.

(*d*) Dav. Conv. (4th ed.) vol. ii. pt. ii. p. 462, n.

mainderman (if he will concur), covenants for the payment of the money and for the title.

Whether mortgage of portion term should be by assignment or demise.

The mortgage of the term is usually by assignment of the whole term, but sometimes it is made by demise of a part of the term, with a proviso for cesser on payment of the mortgage money. As the term is not burdened with any rents or onerous covenants or obligations, the only advantage of a demise is, that it saves the necessity for a re-assignment or surrender on redemption.

CHAPTER XXIV.

MORTGAGES BY ECCLESIASTICAL CORPORATIONS.

Rectories and tithes.

i.—Mortgages by Ecclesiastical Person of Profits of Benefice to secure his own Debts.—Rectories impropriate and tithes in lay hands may be the subject of mortgage in like manner as any other species of real estate (*a*).

Mortgage of profits of ecclesiastical benefice.

There exists no rule of public policy, independent of restraining statutes, which prevents an ecclesiastic from dealing with his temporalities (*b*).

13 Eliz. c. 20.

By 13 Eliz. c. 20, it was enacted, that "all chargings of any benefice with cure thereafter, with any pension or with any profit out of the same to be yielded and taken, thereafter to be made, other than rents to be received upon leases thereafter to be made, according to the meaning of that Act, should be *utterly void*." By 3 Car. I. c. 4, s. 2, this Act was made perpetual.

57 Geo. III. c. 99.

By 43 Geo. III. c. 84, 13 Eliz. c. 20 and 3 Car. I. c. 4, s. 2, were wholly repealed. The 57 Geo. III. c. 99 repealed 43 Geo. III. c. 84, and also repealed part of 13 Eliz. c. 20, but did not repeal in terms the clause relating to the charging of livings.

37 & 38 Vict. c. 96.

The 57 Geo. III. c. 99 was repealed by 1 & 2 Vict. c. 106, s. 1, except such part as repealed any former Acts; and 1 & 2 Vict. c. 106, s. 1, has been repealed by 37 & 38 Vict. c. 96; but the effect of all these repeals is that 13 Eliz. c. 20, so far as relates to charges on benefices, is still in force (*c*).

What securities are void under the Act.

A mortgage of pew rents by a vicar of a district church is void under the Act of Elizabeth (*d*). A lease of a rectory and tithes and a receivership deed thereof, being a contrivance to

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(*a*) *Ante*, p. 178.

(*b*) See *Grenfell* v. *Dean and Canons of Windsor*, 2 Beav. 544.

(*c*) See *Hawkins* v. *Gathercole*, 6 De G. M. & G. 1, at pp. 20, 21; *Garnett* v. *Bradley*, 3 App. Ca. 944, at pp. 950, 951.

(*d*) *Exp. Arrowsmith*, 8 Ch. D. 96, C. A.

secure a charge, were held void (*e*). A composition with a clergyman in consideration that his future income may be received by a trustee, and applied in liquidation of his debts after providing for a curate, is void (*f*). By the Land Transfer Act, 1897 (*g*), an incumbent of a benefice who is registered proprietor of land cannot create a lien on it by deposit of the land certificate (*g*).

Charge by prebendary.

Where a manor or rectory is specifically allotted to a prebend, the prebendary has power to charge it (*h*). So he may alien any property attached to the office without losing his stall or voice in the chapter (*i*). So the lands and emoluments attached to a canonry (which is an ecclesiastical office without cure), can, it seems, form the subject of a charge or mortgage (*k*). But a mortgage by demise of the lands, messuages, &c. belonging to a canonry of St. George's Chapel, Windsor, was held, in the last-mentioned case, not to pass a house in which the canon lived, the house in question being vested in the dean and chapter, and not attached to the canonry, but liable to be exchanged for the house of another canon in the event of a vacancy among the canons, each canon thus taking the temporary use of any particular house for the purposes of residence (*l*); but the canonry itself, as an ecclesiastical office, or even the prebendary, since 13 & 14 Car. II. c. 4 (with two exceptions), cannot, it seems, be the subject of a grant (*l*).

Benefice with cure.

Where a scheme confirmed by Order in Council under the Pluralities Amendment Act, 1850 (*m*), and the Union of Benefices Act, 1860 (*n*), provided that two city benefices should be united, and that the incumbent retiring in order that the union should have immediate effect should receive out of the annual income of the united benefices certain annuities during the joint lives of himself and the incumbent of the united benefices so long as he should perform the duties of curate thereof, under the title of vicar-in-charge, with a further provision after the death of the incumbent of the united benefices, it was held that the

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(*e*) *Waltham* v. *Crafts*, 6 Exch. 1.

(*f*) *Alchin* v. *Hopkins*, *Clk.*, 1 Bing. N. C. 99.

(*g*) 60 & 61 Vict. c. 65, s. 15; *ante*, p. 51.

(*h*) *Hare* v. *Bickley*, Plow. 526; *Doe* v. *Musgrave*, 1 Man. & Gr. 631.

(*i*) *Dean and Chapter of Norwich Case*, 3 Rep. 73, 75, b. See Com. Dig. Eccl. "Persons," C. 4.

(*k*) See *Doe* v. *Musgrave*, *sup.*; *Grenfell* v. *Dean of Windsor*, 2 Beav. 544.

(*l*) *Doe* v. *Musgrave*, 1 Man. & Gr. 631.

(*m*) 13 & 14 Vict. c. 98.

(*n*) 23 & 24 Vict. c. 142.

effect of such provisions was not to give to the retiring incumbent a "benefice with cure" within the meaning of the statute 13 Eliz. c. 20, and that he could accordingly make a valid mortgage of the annuities (*o*).

Redemption of land tax.

Where an incumbent pays off the land tax he has a security on the living if he exercises the option given by the Land Tax Acts (*p*).

Charges on church livings void.

A charge on a church living, if made subsequently to 57 Geo. III. c. 99, is void (*q*); but not so, if made in the intermediate period between the passing of 43 Geo. III. c. 84, and 57 Geo. III. c. 99 (*r*); and where a term to secure an annuity was created in the living *prior* to the latter statute, but assigned *subsequently* to it, to secure a sum advanced to redeem the annuity, or to secure a fresh annuity granted in consideration of such sum (*s*), such assignment was held valid; and such term may be assigned as a security for a much larger annuity or sum (*t*); and if in a deed of charge made in the intermediate period, there is a covenant to charge any living subsequently acquired, and an exchange is made prior to the revival of 13 Eliz. c. 20, the charge on the newly-acquired living will be valid, although the new grant is dated subsequently to the statute 57 Geo. III. c. 99 (*u*).

The Irish Act, 10 & 11 Car. I. c. 3, does not render invalid a charge on a benefice during the life of the grantor, but only prevents it from binding his successor (*x*).

Though the charge is void, collateral securities—*e.g.*, covenants, bonds, and warrants of attorney—to secure the debt, are valid, as the transaction is not *malum in se* (*y*).

Charge *per indirectum.*

A charge on a church living which cannot, since 57 Geo. III. c. 99, be created *per directum*, cannot be created *per indirectum*. And therefore a warrant of attorney reciting the annuity deed, and that the warrant is executed to the intent that a sequestra-

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(*o*) *McBean* v. *Deane*, 30 Ch. D. 520.

(*p*) *Kilderbee* v. *Ambrose*, 10 Exch. 454. See 38 Geo. III. c. 60, s. 37; 39 Geo. III. c. 6, s. 5.

(*q*) *Shaw* v. *Pritchard*, 10 B. & Cr. 241. See *ante*, p. 177.

(*r*) *Doe* v. *Somerville*, 6 B. & Cr. 126.

(*s*) *Doe* v. *Gully*, 9 B. & Cr. 344; *Doe* v. *Ramsden*, 4 B. & Ad. 608.

(*t*) *Doe* v. *Ramsden*, *sup.*; *Moore* v. *Ramsden*, 7 A. & E. 898.

(*u*) *Metcalfe* v. *Archbishop of York*, 1 My. & Cr. 547.

(*x*) *Wise* v. *Beresford*, 3 Dr. & War. 276.

(*y*) *Mouys* v. *Leake*, 8 T. R. 411; *Doe* v. *Mears*, Cowp. 129; *Errington* v. *Howard*, Amb. 485. And see *Doe* v. *Barber*, 2 T. R. 749; *Brown* v. *Rose*, 6 Taunt. 124; *Arbuckle* v. *Cowtan*, 3 B. & P. 321; *Faircloth* v. *Gurney*, 9 Bing. 622.

tion may be obtained by the annuitant and continued during the continuance of the annuity for better securing the same, is void, as showing an intent indirectly to create a charge on the living (*z*).

An agreement for giving priority to any particular judgment, in execution against a benefice, is void (*a*). But if nothing appears on the instrument necessarily leading to the conclusion that such was the intent, the warrant of attorney will be valid, although the consequence may be that the profits of the living will probably be taken in execution (*b*).

Warrant of attorney.

In three cases of annuity, the Courts have confined the sequestration to the arrears due, but have upheld the warrant of attorney and judgment (*c*).

It was decided that a judgment entered up on a warrant of attorney for securing an annuity charged on a living in the North Riding of Yorkshire (supposing the same to be in other respects maintainable), need not be registered under 8 Geo. II. c. 6, by reason that though it may be enforced by sequestration, yet the benefice is not affected by *the judgment* (*d*).

Parol evidence.

If the intention to affect the benefice does not appear on the face of any of the securities, mere parol evidence of the intention is not admissible to impeach them (*e*).

Result of authorities.

The result of the authorities has been stated as follows: a warrant of attorney, given by a clergyman, will be valid, although its immediate object and consequence is a sequestration of his benefice; but the intention to affect the living directly or indirectly must not appear on the face of the warrant, nor, as it is conceived, on any collateral instrument (*f*).

Powers of incumbent to mortgage generally.

ii.—Mortgages by Incumbents of Benefices under Statutory Powers for Building, &c.—The incumbent of a benefice is empowered (*g*), with the consent of the ordinary and patron

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(z) *Flight* v. *Salter*, 1 B. & Ad. 673; *Newland* v. *Watkin*, 9 Bing. 113; *Saltmarshe* v. *Hewett*, 1 A. & E. 812.

(a) *Long* v. *Storie*, 3 De G. & S. 308.

(b) *Gibbons* v. *Hooper*, 2 B. & Ad. 734. And see *Newland* v. *Watkin*, 9 Bing. 113; *Faircloth* v. *Gurney*, 9 Bing. 622; *Aberdeen* v. *Newland*, 4 Sim. 281; *Colebrook* v. *Layton*, 4 B. & Ad. 579.

(c) *Kirlew* v. *Butts*, 2 B. & Ad. 736, n.; *Moore* v. *Ramsden*, 3 B. & Ad. 917, n., and *S. C.*, 4 B. & Ad. 608; *Britten* v. *Wait*, 3 B. & Ad. 915.

(d) *Cottle* v. *Warrington*, 5 B. & Ad. 447.

(e) *Colebrook* v. *Layton*, 4 B. & Ad. 579; *Bishop* v. *Hatch*, 4 Jur. 318; *Johnson* v. *Brazier*, 1 A. & E. 624.

(f) Dav. Conv., vol. ii. pt. ii. p. 26.

(g) 17 Geo. III. c. 53; 21 Geo. III. c. 66; 1 & 2 Vict. c. 23. These Acts are commonly called "Gilbert Acts."

thereof, to borrow and take up at interest a sum of money exceeding one year's, but not exceeding three years', net income of his benefice for the purpose of building, repairing, or purchasing a house and other necessary buildings, or a proper site for such house and other necessary buildings, to be used as the parsonage or glebe house and offices for his benefice, such house, if purchased, to be at a distance of not more than one mile from the church; and as a security for the money so to be borrowed, to mortgage the glebe, tithes, rentcharges, rents and other profits and emoluments of his benefice for the term of thirty-five years, the principal so borrowed being repayable by thirty annual instalments, with interest to accrue due thereon and in the same manner; and, subject to the like consents and provisions, an incumbent is empowered (*h*) to borrow any sum of money not being less than one hundred pounds, and not exceeding three years' net income of his benefice, for the purpose of purchasing any lands or hereditaments, not exceeding twelve acres, contiguous to or desirable to be used or occupied with the parsonage house or glebe belonging to such benefice, or for the purpose of building any offices, stables or outbuildings, or fences necessary for the occupation or protection of such parsonage, or for the purpose of restoring the fabric of the chancel of the church of such benefice (when the incumbent is liable to repair the same), or of expenditure upon farm buildings upon lands appertaining to such benefice.

Additions to parsonage.

Money employed in adding additional rooms to a parsonage house may be charged on the living under 17 Geo. III. c. 53 (*i*).

Who may advance money.

The incumbent may advance his own money (*i*). But the money may not be advanced by a person whose duty it is to see that the provisions of the Act are properly carried out for the benefit of the living (*k*).

Form of statutory mortgage.

The mortgage and other necessary deeds must be in the forms prescribed by statute (*l*); and the mortgage-money must be paid to the person authorized to receive the same by the ordinary, patron and incumbent (*m*).

Meaning of "benefice."

"Benefice" is to be construed to comprise "all rectories with cure of souls, vicarages, perpetual curacies, and chapelries, the

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(*h*) 28 & 29 Vict. c. 69, s. 1.

(*i*) *Boyd* v. *Barker*, 4 Drew. 582. See Parsonages Act, 1911 (1 & 2 Geo. V. c. 29).

(*k*) *Greenlaw* v. *King*, 3 Beav. 49.

(*l*) 17 Geo. III. c. 53, Sched.; 21 Geo. III. c. 66, Sched.

(*m*) 17 Geo. III. c. 53, s. 4.

incumbents of which respectively in right thereof shall be corporations sole" (*n*).

Successors bound.

A mortgage made by an incumbent in manner above mentioned is binding upon his successors in office (*o*).

Essentials of mortgage.

It is, however, essential under the Clergy Residences Repair Act, 1776, first, that the money borrowed for the purposes of the Act should be borrowed and security given before the money is applied, and, secondly, that the money when borrowed should be paid to and applied by, not the incumbent, but a nominee appointed by the bishop, patron and incumbent (*p*).

Charge for residence.

The Act 1 & 2 Vict. c. 106, s. 62, authorizes the bishop, on the avoidance of a benefice not having a fit house of residence, to raise money for building a residence by mortgage of the glebe, tithes, rents, and profits, and prescribes a form of mortgage given in the schedule to the Act. And by sect. 70 of the same Act, the bishop is empowered to raise money by such mortgage for the purchase of a suitable residence elsewhere than on the glebe without any limit as to distance from the church.

Mortgage of benefice after augmentation.

By the statute 5 & 6 Vict. c. 26, s. 13, where a benefice has been augmented under the statute 3 & 4 Vict. c. 113, the powers of incumbents to raise money by mortgage for purchasing, building, or improving their houses of residence are not to be exercised without the consent of the Ecclesiastical Commissioners signified under their common seal.

Powers of incumbent to mortgage to Governors of Queen Anne's Bounty.

Under the Ecclesiastical Dilapidations Act, 1871 (*q*), as amended by an Act of the following year (*r*), powers of borrowing on mortgage from the Governors of the Bounty of Queen Anne are conferred upon an incumbent for the purpose of meeting expenses of repairs for which he is liable. These restricted powers are exerciseable by the incumbent concurrently with the above-mentioned general powers. The form of mortgage under these Acts, and the conditions and provisions under which such mortgages may be effected, are prescribed by the sections in the note hereto (*s*). A mortgage made by an incumbent to the Governors of Queen Anne's Bounty may be

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(*n*) 1 & 2 Vict. c. 23, s. 16.

(*o*) 17 Geo. III. c. 53, Sched.; 21 Geo. III. c. 66, Sched.

(*p*) *Lidbetter* v. *Hatch*, (1907) 1 Ch. 404.

(*q*) 34 & 35 Vict. c. 43.

(*r*) 35 & 36 Vict. c. 96.

(*s*) 34 & 35 Vict. c. 43, ss. 17, 38, 62, 64, and 73; 35 & 36 Vict. c. 96, ss. 1, 2, and 3.

subsequently modified by the Governors by extending the time for repayment to them of the mortgage-money (t).

Mortgages by deans or canons of their deaneries or canonries.

By the Ecclesiastical Commissioners Act, 1840 (u), it is enacted that the Ecclesiastical Commissioners may "authorize any dean or canon of any cathedral church to raise moneys on his deanery or canonry, for the purpose of building, enlarging, or otherwise improving the residence house thereof, on such terms and conditions as the said Commissioners with the concurrence of the Bishop and the chapter shall approve." And it is also provided that all the provisions of "an Act to amend the law for providing fit houses for the beneficed clergy" (x) shall be applied, *mutatis mutandis*, to all such cases in which any dean or canon shall be so authorized to raise moneys on his deanery or canonry for such purpose.

It is further provided by the Ecclesiastical Houses of Residence Act, 1842 (y), that sect. 59 of the Ecclesiastical Commissioners Act, 1840, "shall be extended so as to make lawful the raising of moneys, in the manner and with the authority therein provided, by any dean and chapter, dean or canon, for any purpose of this Act."

Mortgages by universities and colleges.

By the Universities and College Estates Act (z), powers of mortgaging their estates are given to the Universities and Colleges of Oxford, Cambridge, Dublin, Winchester and Eton, with the consent of the Board of Agriculture.

By the Universities and Colleges Estates Acts Extension, 1860 (a), further powers are conferred; and as to Winchester and Eton Colleges, see 31 & 32 Vict. c. 118, ss. 24, 25, and 28.

By the Universities and Colleges Estates Act, 1898 (b), the purposes for which money may be borrowed by a university or college include improvements, to which capital money under the Settled Land Acts may be applied.

(t) 44 & 45 Vict. c. 25; 49 & 50 Vict. c. 34; 50 & 51 Vict. c. 8; 59 & 60 Vict. c. 13.

(u) 3 & 4 Vict. c. 113, s. 59.

(x) 1 & 2 Vict. c. 23, *sup.*

(y) 5 & 6 Vict. c. 26, s. 5.

(z) 21 & 22 Vict. c. 44.

(a) 23 & 24 Vict. c. 59. And see 43 & 44 Vict. c. 46.

(b) 61 & 62 Vict. c. 55, s. 3.

CHAPTER XXV.

OF MORTGAGES BY MUNICIPAL CORPORATIONS AND OTHER LOCAL AUTHORITIES.

Statutory restrictions on borrowing powers of corporations.

i.—Mortgages by Municipal Corporations.—By the common law, a body corporate may deal with its property, by way of mortgage or otherwise, as freely as an individual. But restrictions upon the borrowing powers of municipal corporations have been from time to time imposed by the Legislature, as regards particular corporations, by various special Acts, and, generally, by the public Acts hereafter mentioned.

Repealed statutes.

By the Municipal Corporations Act, 1835 (*a*), the councils of bodies corporate elected under the Act were restrained from mortgage and alienation of the lands, tenements, or hereditaments of the corporation, except with the consent of the Lords Commissioners of the Treasury, and after such notice as is required by the Act.

By 6 & 7 Will. IV. c. 104, s. 1, and 7 Will. IV. & 1 Vict. c. 78, s. 28, the councils of corporate bodies were authorized to give new securities for old debts.

And by the Municipal Corporations Mortgages Act, 1860 (*b*), in any case where the Commissioners of the Treasury approve of any mortgage of any hereditaments of the body corporate of any borough to which the Act applies, they may, as a condition of their approval, require that the money borrowed on the security of such mortgage shall be repaid, with all interest thereon, in thirty years, or any less period, and either by instalments or by means of a sinking fund, or both, as the Commissioners may think fit.

Stat. 45 & 46 Vict. c. 50.

The Municipal Corporations Act, 1882 (*c*), repeals the three first-mentioned Acts generally, and the Municipal Corporations

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(*a*) 5 & 6 Will. IV. c. 76, s. 94.

(*b*) 23 Vict. c. 16, s. 1.

(*c*) 45 & 46 Vict. c. 50, s. 5

Mortgages Act, 1860, as to the cities and towns to which the repealing Act applies.

Restricted powers of borrowing under this Act.

Sect. 108 of the repealing Act re-imposes upon the councils of those bodies corporate to which it applies a restraint upon mortgaging corporate land without the approval of the Treasury, now the Local Government Board (*d*), unless authorized so to do by Act of Parliament.

Application of the Act.

The repealing Act applies "to every city and town to which the Municipal Corporations Act, 1835, applies at the commencement of this Act, and to any town, district, or place whereof the inhabitants are incorporated after the commencement of this Act, and whereto the provisions of the Municipal Corporations Acts are under this Act extended by charter, but to no other place" (*e*).

The cities and towns in respect to which special provisions as to borrowing were contained in the Municipal Corporations Act, 1835, are those "bodies corporate" mentioned in the schedules A. and B. to that Act (*f*); the use of the words "council," "corporate land," &c. in the empowering sections of the Act of 1882 seems to show that the provisions of that Act as to borrowing are to extend to such cities and towns only, and not to all the cities and towns to which the Act of 1835 in any way applies.

By sect. 106 of the Act of 1882 it is enacted that—

Power to borrow with approval of Treasury.

> "The council may, with the approval of the Treasury (Local Government Board), borrow at interest on the security of any corporate land, or of any land proposed to be purchased by the council under this Act, or of the borough fund or borough rate, or of all or any of those securities, such sums as the council from time to time think requisite for the purchase of land, or for the building of any building which the council are by this Act authorized to build."

Power to mortgage corporate land.

And by sect. 109 the council is empowered, with the approval of the Local Government Board, to dispose of any corporate land by way of mortgage or charge "in such manner and on such terms and conditions as the Local Government Board approve."

Repayment of loans.

By sects. 112 and 113 of the same Act the Local Government Board is empowered to require the mortgage debt to be

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(*d*) 51 & 52 Vict. c. 41, s. 72.

(*e*) 45 & 46 Vict. c. 50, s. 6.

(*f*) 5 & 6 Will. IV. c. 76, ss. 94 and 142.

repaid, with interest, within thirty years or any less period, and either by instalments, or by means of a sinking fund to be provided in manner prescribed by the Act.

Power to borrow for buildings.

Sect. 120 empowers the council of a borough to borrow money from the Public Works Loan Commissioners for buildings by mortgage of the rates.

Provisions as to existing mortgages.

Sects. 125 to 132 inclusive of the same Act contain provisions with regard to mortgage debts, &c. contracted by municipal corporations at different periods prior to the commencement of the Act.

Overdraft.

A corporation cannot evade the statutory regulations on borrowing by obtaining an overdraft from their bankers and then levying a rate to pay it off (*g*).

Remedy of mortgagee.

Where, under a special Act, debentures of a corporation were payable, so many each year, out of the rates by ballot, it was held that the holders of the bonds not drawn were not entitled to sue or have a receiver for payment of their principal (*h*); but an account of the rates was decreed when the corporation had deprived the debenture holder of the benefit of the ballot (*i*).

If debentures are payable out of future rates, the remedy is not a receiver, but a *mandamus* (*k*).

Bonds charged on borough fund.

Bonds charged on a borough fund, made up of rents and profits and mortgages of tolls, being ancient franchises, were held (*l*) to be debts affecting the corporation lands, under sect. 69 of the Lands Clauses Consolidation Act (*m*).

Power to borrow on credit of rates for sanitary purposes.

ii.—Mortgages by Local Authorities under Public Health Acts.—By the Public Health Act, 1875, s. 233, any local authority may, with the sanction of the Local Government Board, for the purpose of defraying any costs, charges, and expenses incurred or to be incurred by them in the execution of the Sanitary Acts, or of that Act, or for the purpose of discharging any loans contracted under the Sanitary Acts, or that Act, borrow or reborrow and take up at interest any sums of money necessary for defraying any such costs, charges, and expenses, or for discharging any such loans as aforesaid (*n*).

(*g*) *Att.-Gen.* v. *De Winton*, (1906) 2 Ch. 106.

(*h*) *Preston* v. *Corp. of Great Yarmouth*, L. R. 7 Ch. 655.

(*i*) *Fletcher* v. *Gibbon*, 23 Beav. 212.

(*k*) *Drewry* v. *Barnes*, 3 Russ. 94.

(*l*) *Re Derby Municipal Estates*, 3 C. D. 289.

(*m*) 8 & 9 Vict. c. 18.

(*n*) 38 & 39 Vict. c. 55.

"Local authority," for the purposes of this Act, means urban and rural sanitary authorities (*o*).

A local authority cannot borrow without the previous sanction of the Local Government Board (*p*), nor except for a purpose which falls within the Act (*q*).

A local authority has no power under s. 233 to borrow money for *permanent* loans, unless the loan is secured by a mortgage, duly registered, of some fund or rate. Consequently the payment of interest on a permanent loan not so secured is illegal (*r*).

Where a corporation has power to borrow with the sanction of the Local Government Board for a particular purpose, it cannot borrow the money by way of an overdraft at its bankers (*s*).

The Act contains regulations as to the exercising of borrowing powers, and the form, register, and transfer of mortgages and rentcharges (*t*).

Under sects. 4 and 257 the payments for sewerage are a charge on the whole premises, and on every owner in proportion to his interest (*u*).

Purpose of providing hospitals, &c.

By the Public Health (London) Act, 1891 (*x*), sanitary authorities in the city of London and the metropolitan area are empowered to borrow, with the like sanction, for the provision of hospitals and mortuaries, and the purposes of epidemic regulations, also for the purpose of providing lavatories, &c.

Regulations as to borrowing powers.

The exercise of borrowing powers by local authorities generally is governed by the Local Loans Act, 1875 (*y*), which contains regulations as to issue of debentures, debenture stock, and annuity certificates, and provisions as to priority of loans, remedies for non-payment of moneys lent, the discharge of loans within a prescribed period either by annual appropriation or by means of a sinking fund, and other matters relating to loans contracted by such authorities.

Local authorities may borrow, or reborrow to pay off existing loans, in manner prescribed by this Act, notwithstanding any provisions in any other Act previously passed.

(*o*) *Ibid.* s. 4.

(*p*) *Re Sheffield Bldg. Soc.*, 21 Q. B. D. 301.

(*q*) 10 App. Ca. 354.

(*r*) *Rex* v. *Locke*, (1910) 2 K. B. 201.

(*s*) *Att.-Gen.* v. *West Ham Corp.*, (1910) 2 Ch. 560.

(*t*) 38 & 39 Vict. c. 55, ss. 234—241.

(*u*) *Birmingham Corp.* v. *Baker*, 17 Ch. D. 782.

(*x*) 54 & 55 Vict. c. 76, s. 105.

(*y*) 38 & 39 Vict. c. 83.

Chap. XXV. (ii.)

Advances by Public Works Commissioners.

A long series of statutes, commencing with 57 Geo. III. c. 34, and by which the Commissioners of the Treasury were authorized to make advances of public money for various useful public works and purposes, taking securities for the repayment thereof upon the works, and the tolls, and other proceeds derived therefrom, has been repealed by the Public Works Loans Act, 1875 (*z*), by which the Public Works Loan Commissioners have power to make loans for any of the works mentioned in the first schedule to the Act to any person having statutory or other power to borrow for such purpose.

Power to borrow for providing prisons.

iii.—Mortgages by Prison Authorities.—Prison authorities had power under the statutes 5 Geo. IV. c. 12, s. 10; 5 & 6 Vict. c. 98, ss. 3, 5, and 10; 11 & 12 Vict. c. 39, and the Prisons Act, 1865 (*a*), to borrow money on mortgage of the rates for the purposes of altering, rebuilding existing prisons, and erecting new prisons. These powers were, by the Prisons Act, 1877 (*b*), explained by the Prisons Act, 1884 (*c*), transferred to, and vested in, the Secretary of State. The 46th section of the Act of 1877 gives to prison authorities new borrowing powers for the limited purposes mentioned in sects. 17 and 34 of the Act.

Power of justices to borrow.

iv.—Mortgages for Repair of Bridges and Lighthouses.—By the statute 4 & 5 Vict. c. 49, justices at sessions may borrow money for the repair of bridges, on the county rates, and may charge the rates with interest on the money borrowed, and such further sum as shall insure repayment thereof in fourteen years. This Act gives, in the schedule thereto, a form of mortgage to be used as security for such loans. And by the statute 43 & 44 Vict. c. 5 (*d*), money may be borrowed by the county authority under the Highways and Locomotive Amendment Act, 1878 (*e*), for the erection of county bridges.

Transfer of powers to county councils.

These powers are, by the Local Government Act, 1888 (*f*), sect. 3, transferred to the councils of each county.

(*z*) 38 & 39 Vict. c. 89.

(*a*) 28 & 29 Vict. c. 126, ss. 27—29.

(*b*) 40 & 41 Vict. c. 21.

(*c*) 47 & 48 Vict. c. 51.

(*d*) Partly repealed by Stat. Law Rev. Act, 1894.

(*e*) 41 & 42 Vict. c. 77.

(*f*) 51 & 52 Vict. c. 41.

Lighthouses.

The Board of Trade may mortgage the General Lighthouse Fund for the purpose of constructing and repairing lighthouses, and the mortgagee need not inquire as to the purpose for which the money is raised (*g*).

Power of justices to borrow.

v.—**Mortgages for Purposes of Lunatic Asylums.**—By the Lunatic Asylums Act, 1853 (*h*), repealing (*i*) certain earlier statutes (*k*) without prejudice to any act done or contract made thereunder, power was conferred upon the justices of every county in general or quarter sessions assembled, or the major part (not being less than five) of them, and upon the council of every borough, to borrow and take up on mortgage of the county or borough rates any sums of money required for the payment of the moneys, costs, and expenses payable for any of the purposes of that Act or of the said repealed Acts. The same Act provided a form of mortgage, and contained provisions as to payment of interest upon, and as to the repayment of, the principal sums borrowed (*l*).

Transfer of powers to county councils.

The above powers of borrowing were, by the Local Government Act, 1888 (*m*), transferred to the council of each county.

By the Lunacy Act, 1890 (*n*), the Act of 1853, and several amending Acts not material to the present purpose, were repealed, and by sect. 274 of the repealing Act it is enacted as follows :—

> "(1.) For the purpose of paying any money payable under this Act, or for repaying any moneys borrowed under this Act or any former Act, authorizing borrowing for purposes of asylum accommodation, the local authority may with the consent of the Local Government Board, and subject to the provisions of the Local Government Act, 1888, and the Municipal Corporations Act, 1882, according as the same respectively are applicable to the local authority, borrow on the security of the county or borough fund, and of any revenue of the local authority, or on either such fund or revenues, or on any part of the revenues, such money as the local authority requires."

Power of overseers and guardians to borrow.

vi.—**Mortgages by Poor Law Guardians.**—By a series of statutes passed from time to time, overseers or guardians, with

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(*g*) 57 & 58 Vict. c. 60, s. 662.

(*h*) 16 & 17 Vict. c. 97, ss. 47 and 52.

(*i*) *Ibid.* s. 1.

(*k*) 8 & 9 Vict. c. 126 ; 9 & 10 Vict. c. 84 ; 10 & 11 Vict. c. 43.

(*l*) 16 & 17 Vict. c. 97, ss. 49, 50.

(*m*) 51 & 52 Vict. c. 41, ss. 3, 69.

(*n*) 53 Vict. c. 5.

the consent of the Poor Law Commissioners (*o*), overseers by order of the Commissioners (*p*), guardians with the consent of the Poor Law Board (*q*), and district boards of schools and asylums, with the consent and order of the Poor Law Board (*r*), have been empowered to borrow money upon the security of the rates of their respective parishes within the limits as to amount and for the several purposes mentioned in the several Acts.

Metropolitan Asylums Board.

Managers of asylums in the metropolis are empowered to borrow money chargeable in like manner upon the district rates (*s*).

Form of mortgage.

Sect. 6 of the Poor Law Act, 1869, contains a form of deed in accordance with which any security for money borrowed under the authority of any poor law board may be made.

Register of securities.

By sect. 14 of the Divided Parishes and Poor Law Amendment Act, 1882 (*t*), it is provided that guardians of unions and managers of school districts shall keep registers of the securities in respect of all sums borrowed by them.

Borrowing by guardians and managers of district schools, &c.

By sect. 2 of the Poor Law Act, 1889 (*u*), it is enacted as follows:—

"(1.) The guardians of any union may, with the sanction of the Local Government Board, borrow for the purpose of raising the expenses incurred, or proposed to be incurred, for any permanent work or object, or any other thing the costs of which ought, in the opinion of the Local Government Board, to be spread over a term of years.

"(2.) A loan shall not be of such amount as exceeds, or will make the total debt of the guardians under the Acts relating to the relief of the poor exceed, one-fourth of the total annual rateable value of the union.

"(3.) The Local Government Board may, by provisional order, extend the said maximum to double the amount above authorized, and sections 297 and 298 of the Public Health Act, 1875, shall apply to every such Provisional Order in like manner as if they were herein re-enacted and the guardians were a local authority.

"(4.) The unapplied balance of any loan raised by any guar-

(*o*) 4 & 5 Will. IV. c. 76, ss. 23—25 (1834); 29 & 30 Vict. c. 113, s. 8 (1866); 30 & 31 Vict. c. 106, s. 14 (1867); 31 & 32 Vict. c. 122, s. 35 (1868).

(*p*) 5 & 6 Vict. c. 18, s. 6 (1842).

(*q*) 32 & 33 Vict. c. 45 (1869); 34 Vict. c. 11 (1871); 35 & 36 Vict. c. 2 (1872); 42 & 43 Vict. c. 54, ss. 11, 12 (1879).

(*r*) 7 & 8 Vict. c. 101, s. 44 (1844); 13 & 14 Vict. c. 101, s. 3 (1848); 14 & 15 Vict. c. 105, s. 16 (1851); 35 Vict. c. 2, s. 1 (1872); 42 & 43 Vict. c. 54, s. 13 (1879).

(*s*) 32 & 33 Vict. c. 63, s. 9 (1869); 32 & 33 Vict. c. 102, s. 37 (1869); 47 & 48 Vict. c. 60, s. 2 (1884).

(*t*) 45 & 46 Vict. c. 58.

(*u*) 52 & 53 Vict. c. 56, as amended by the Poor Law Act, 1897.

dians may, with the consent of the Local Government Board, be applied to any purpose for which a loan can be raised under this Act by such guardians.

"(5.) This section shall apply to the managers of any school district in like manner as if they were guardians and this section were in terms made applicable thereto, but with the substitution of one-sixteenth of the annual rateable value of the district for one-fourth of the annual rateable value of the union.

"(6.) All enactments in the Acts relating to the relief of the poor touching the purposes for which and the amount to which guardians of unions and managers of any school or asylum district to whom this section applies may borrow, shall be repealed without prejudice to anything done thereunder, but every loan under this section shall be made on the like security as is provided by the enactments in force at the passing of this Act with respect to loans of such guardians and managers."

The Poor Law Act, 1897, which expressly repeals all previous enactments relating to the repayment of loans for poor law purposes, provides for the repayment of such loans in manner therein mentioned (*x*).

Poor law guardians cannot borrow money and redeem at once a loan repayable by instalments where the persons to whom the loan is owing do not consent to such immediate redemption (*y*).

Mortgages of rates to provide burial grounds.

vii.—Mortgages under the Burial Acts.—Burial boards appointed at a vestry meeting by the ratepayers of a parish, township or district (*z*), may raise money for providing a burial ground by mortgage of the rates. The powers of a burial board are, in boroughs, vested in the town council (*a*); in the city of London in the Commissioners of Sewers (*b*); and, in rural parishes which have adopted the Burial Acts, in the parish council (*c*).

With regard to such mortgages, it is enacted by the Burial Act, 1857 (*d*), as follows:—

Sect. 19. "The clauses of the Commissioners Clauses Act, 1847 (*e*), with respect to mortgages to be executed by the Commissioners, shall be incorporated with this Act, and shall apply to mortgages and other securities to be executed by burial boards;

(*x*) Sect. 1.

(*y*) *West Derby Union* v. *Metropolitan Ass. Soc.*, (1897) A. C. 647.

(*z*) 15 & 16 Vict. c. 85, s. 11; 18 & 19 Vict. c. 128, s. 12.

(*a*) 17 & 18 Vict. c. 87, s. 2.

(*b*) 15 & 16 Vict. c. 85, s. 43.

(*c*) 56 & 57 Vict. c. 73, s. 7, *post*, p. 463.

(*d*) 20 & 21 Vict. c. 81.

(*e*) 10 Vict. c. 16.

and for the purposes of this Act the expression 'the Commissioners,' where used in the said clauses, shall mean the burial board acting in the execution of the said clauses and the Acts hereinbefore recited or this Act.

Sect. 20. "Provided always, that for the purposes of providing a sinking fund for paying off the principal money borrowed on mortgages granted under any of the said Acts or this Act, the burial board shall, once in every year, set aside, out of the moneys charged by such mortgages, such sum as they think proper, being a sum equal to or exceeding one-fiftieth part of the principal money so borrowed."

Power of burial board of parish consisting of several poor law districts.

Where two districts are divided for the purposes of relief of the poor, but form one ecclesiastical parish, the burial board of the whole parish may give a mortgage of the future rates of both districts, the repayment of the money being apportionable between the two districts in proportion to the value of the property in each part as rated for the relief of the poor (*f*).

Powers of town councils, &c. to borrow on mortgage of borough funds.

viii.—Mortgages under the Public Libraries Acts.—By the Public Libraries Act, 1855 (*g*), power was given to town councils and boards of commissioners, trustees, and other persons acting in the execution of Improvement Acts, to borrow on the security of mortgages and bonds of borough funds, moneys required for erecting, establishing, and maintaining public libraries; and the provisions of the Companies Clauses Consolidation Act, 1845 (*h*), with respect to the borrowing of money on mortgage or bond were, so far as applicable, incorporated in this Act.

Power of local boards to borrow on mortgages of rates.

By the Public Libraries Act, 1855, Amendment Act, 1871 (*i*), every local board under the Public Health Act, 1848 (*k*), and the Local Government Act, 1858 (*l*), is empowered to adopt and carry into effect the principal Act, and for that purpose to borrow upon mortgage of the general district rate or any separate rate to be levied under the principal Act in conformity with the borrowing provisions of the Local Government Act, 1858 (*l*).

Extension of borrowing powers to "library authorities."

By the Public Libraries Act Amendment Act, 1887 (*m*), the power to erect, establish, and maintain a library given by the

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(*f*) *Reg.* v. *Coleshill* (*Overseers of*), 34 L. J. Q. B. 96.

(*g*) 18 & 19 Vict. c. 70.

(*h*) 8 Vict. c. 16. See *post*, p. 473.

(*i*) 34 & 35 Vict. c. 71.

(*k*) 11 & 12 Vict. c. 63.

(*l*) 21 & 22 Vict. c. 98.

(*m*) 50 & 51 Vict. c. 22.

Act of 1855 is extended to all "library authorities" as defined by the amending Act, *i.e.*, the council, commissioners, board, or other persons or authority carrying into execution the Public Libraries Acts. And by sect. 7 of the amending Act, it is provided that sects. 233, 234, and 236 to 239 inclusive, of the Public Health Act, 1875 (*n*), shall apply with necessary modifications to all money borrowed by any library authority, as if such authority were an urban sanitary authority; and the same section repeals so much of sect. 17 of the Act of 1855 as relates to the incorporation of the borrowing provisions of the Companies Clauses Consolidation Act, 1845, except as to money previously borrowed.

By the Public Libraries Act, 1892 (*o*), the foregoing Acts, and other Acts relating to public libraries, are repealed as from the commencement of this Act. For the purposes of this Act, every urban district and every parish not being within an urban district in England and Wales is a library district (*p*), and may adopt the provisions of the Act (*q*). The library authority being, in an urban district, the urban authority, and, in a parish, the Commissioners appointed and incorporated under the Act, are to carry the Act into operation (*r*). "Every library authority, with the sanction of the Local Government Board, and in the case of a library authority, being Commissioners appointed by a parish, with the sanction also of the vestry of such parish, may borrow money for the purposes of this Act on the security of any fund or rate applicable for those purposes"; and the above-mentioned sections of the Public Health Act, 1875 (*s*), are incorporated, with necessary modifications, so as to apply to all money borrowed for the purposes of this Act as if the library authority were an urban authority (*t*). The Public Works Loan Commissioners may lend any money which may be borrowed by a library authority (*u*). Where the Public Library Act, 1892, has been "adopted" by a rural parish, the library authority is the parish council (*x*).

(*n*) 38 & 39 Vict. c. 55.

(*o*) 55 & 56 Vict. c. 53. See also Public Libraries Act, 1901.

(*p*) *Ibid.* s. 1.

(*q*) *Ibid.* s. 2.

(*r*) *Ibid.* s. 4.

(*s*) 38 & 39 Vict. c. 55.

(*t*) 55 & 56 Vict. c. 53, s. 19. This section applies to district boards in London. See sect. 22 (2).

(*u*) *Ibid.* s. 19 (3).

(*x*) 56 & 57 Vict. c. 73, s. 7, *inf.* p. 463.

Chap. XXV. (ix.)

ix. General Borrowing Powers of County and other Local Councils.—By sect. 69 of the Local Government (England and Wales) Act, 1888 (*y*), county councils are empowered, with the consent of the Local Government Board, to borrow on the security of the county fund, and of any revenues for the consolidation of county debts, the purchase of lands and buildings, the execution of permanent works, the promotion of emigration and colonization, or the paying off of existing loans. And by the same section it is enacted as follows:

> "(5.) A loan under this section shall be repaid within such period, not exceeding thirty years, as the county council, with the consent of the Local Government Board, determine in each case.
>
> "(6.) The county council shall pay off every loan either by equal yearly or half-yearly instalments of principal, or of principal and interest combined, or by means of a sinking fund set apart, invested, and applied in accordance with the Local Loans Act, 1875 (*z*), and the Acts amending the same.
>
> "(8.) Where the county council are authorized to borrow any money on loan they may raise such money either as one loan or several loans, and either by stock issued under this Act, or by debentures or annuity certificates under the Local Loans Act, 1875 (*z*), and the Acts amending the same, or, *if special reasons exist for so borrowing* (*a*), by mortgage, in accordance with sections two hundred and thirty-six and two hundred and thirty-seven of the Public Health Act, 1875 (*b*).
>
> "(9.) Provided that where a county council have borrowed by means of stock they shall not borrow by way of mortgage except for a period not exceeding five years.
>
> "(10.) Where the county council borrow by debentures such debentures may be for any amount not less than five pounds."

By the County Councils Mortgages Act, 1909 (*c*), the words "if special reasons exist for so borrowing" in the Act of 1888, s. 69 (8), are repealed, and that sub-section shall, as respects any money borrowed by way of mortgage before the passing of the Act, be deemed not to have been in force.

By sect. 12 of the Local Government Act, 1894 (*d*), a county council may, if necessary, without the sanction of the Local Government Board, and irrespectively of any limit of borrowing, raise money, to lend to a parish council, by loan, subject to the like conditions and in the like manner as any

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(*y*) 51 & 52 Vict. c. 41.

(*z*) 38 & 39 Vict. c. 83.

(*a*) The words in italics are repealed.

(*b*) 38 & 39 Vict. c. 55.

(*c*) 9 Edw. VII. c. 38, s. 1.

(*d*) 56 & 57 Vict. c. 73.

other loan for the execution of their duties, and subject to any further conditions which the Local Government Board may, by general or special order, impose.

Borowing powers of parish councils.

By sect. 7 of the Local Government Act, 1894 (*d*), the parish meeting of a rural parish may adopt any of the several Acts mentioned in that section, and in the Act referred to as the "adoptive Acts"; and by sect. 12 of the same Act, parish councils are empowered, with the consent of the county council and the Local Government Board, to borrow money for the following purposes, viz.: "(a) for purchasing any land, or building any buildings, which the council are authorized to purchase or build; and (b) for any purpose for which the council are authorized to borrow under any of the adoptive Acts; and (c) for any permanent work or other thing which the council are authorized to execute or do, and the cost of which ought, in the opinion of the county council and the Local Government Board, to be spread over a term of years." The money is to be borrowed "in like manner and subject to the like conditions as a local authority may borrow for defraying expenses incurred in the execution of the Public Health Acts, and sects. 233, 234, and 236 to 239 of the Public Health Act, 1875 (*e*), shall apply accordingly, except that the money shall be borrowed on the security of the poor rate and of the whole or part of the revenues of the parish council, and except that as respects the limit of the sum to be borrowed, one half of the assessable value shall be substituted for the assessable value for two years." A charge for the purpose of any of the adoptive Acts is to be ultimately upon the rate applicable to the purposes of that Act.

x.—Borrowing Powers of Education Authorities.—School boards, constituted by the Elementary Education Act, 1870 (*f*), were empowered by sect. 57 of that Act to borrow money for certain purposes. That section was repealed by sect. 10 of the Elementary Education Act, 1873 (*g*), which conferred upon school boards a similar but slightly varied power of borrowing for the particular purposes, and in the manner mentioned in the repealing section. This section was in turn repealed by the Education Act, 1902.

(*d*) 56 & 57 Vict. c. 73.
(*e*) 38 & 39 Vict. c. 55.
(*f*) 33 & 34 Vict. c. 75.
(*g*) 36 & 37 Vict. c. 86.

Temporary loan for current expenses.

A school board had no power to borrow money and to charge the ratepayers with interest which the board had paid under the contract of loan, for purposes or in manner other than as prescribed by the Act of 1873, as, for instance, where a board contracted a temporary loan to meet current expenses, which the school fund was not sufficient to pay, until they could obtain money out of the rates (*h*). But under the Education Act, 1903 (*i*), a school board may in certain circumstances borrow money to meet current expenses.

Power to raise money to build, &c. industrial schools.

The provisions of sect. 10 of the Act of 1873 were, by the Elementary Education Act, 1876 (*k*), rendered applicable to the establishing, building and maintaining by school boards of certified day industrial schools thereby established, and certified industrial schools established by the Industrial Schools Act, 1866 (*l*), with the exception that "one of Her Majesty's Principal Secretaries of State" is to be substituted for "education department" throughout the section. It is also enacted that "such establishment and building shall be deemed to be a work for which a school board is authorized to borrow within the meaning of the first schedule to the Public Works Loan Act, 1875" (*m*).

Further powers of borrowing are conferred upon school boards by sect. 3 of the Elementary Education (Industrial Schools) Act, 1879 (*n*).

Power to borrow for education of blind and deaf children.

By sect. 5 of the Elementary Education (Blind and Deaf Children) Act, 1893 (*o*), school boards and other "school authorities," as defined by the Act, are invested with similar powers of borrowing to those conferred on school boards by the Elementary Education Acts (*p*), subject to a discretionary power in the Education Department to consent to the exercise thereof.

Education Act, 1902.

The Education Act, 1902 (*q*), provides as follows :—

> Sect. 5. The local education authority shall throughout their area have the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870

(*h*) *Reg.* v. *Reed*, 5 Q. B. D. 483, C. A.

(*i*) 3 Edw. VII. c. 10.

(*k*) 39 & 40 Vict. c. 79, s. 15, amended by 2 Edw. VII. c. 42.

(*l*) 29 & 30 Vict. c. 118.

(*m*) 38 & 39 Vict. c. 89.

(*n*) 42 & 43 Vict. c. 48.

(*o*) 56 & 57 Vict. c. 42.

(*p*) *Vide sup.* [illegible]

(*q*) 2 Edw. VII. c. 42.

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to 1900, and any other Acts including local Acts . . . . and school boards and school attendance committees shall be abolished.

"Sect. 19.—(1.) A council may borrow for the purposes of the Elementary Education Acts, 1870 to 1900, or this Act in the case of a county council as for the purposes of the Local Government Act, 1888, and in the case of a council of a county borough, borough, or urban district as for the purposes of the Public Health Acts; but the money borrowed by a county borough, borough, or urban district council, shall be borrowed on the security of the fund or rate out of which the expenses of the council under this Act are payable.

"(2.) Money borrowed under this Act shall not be reckoned as part of the total debt of a county for the purposes of sect. 69 of the Local Government Act, 1888, or as part of the debt of a county borough, borough, or urban district for the purpose of the limitation or borrowing under sub-sects. 2 and 3 of sect. 234 of the Public Health Act, 1875."

The Education (London) Act, 1903, extends the borrowing powers given to county councils by the above section to the London County Council (*r*).

By the Education Act, 1907 (*s*), a local education authority may borrow money from the Public Works Loan Commissioners for the purposes of higher education.

(*r*) 3 Edw. VII. c. 24, Sch. 5.

(*s*) 7 Edw. VII. c. 43, s. 8.

CHAPTER XXVI.

MORTGAGES BY BUILDING AND FRIENDLY SOCIETIES.

Unincorporated societies still governed by the Act of 1836.

i.—As to Unincorporated Building Societies.—Benefit building societies were, prior to 1874, governed by the Benefit Building Societies Act, 1836 (*a*). Societies formed under that Act were not corporate bodies, but acted and held their property through the medium of directors and trustees. This Act was repealed by the Building Societies Act, 1874 (*b*), except as regards societies then subsisting until incorporated. Many societies, formed under the repealed Act, still exist; and some of these, not having obtained certificates of incorporation under the later Act, are still regulated by the provisions of the repealed Act.

Borrowing powers of an unincorporated society.

The Act of 1836 contained no provisions authorizing the directors of building societies to borrow money; and accordingly the power of an unincorporated society to borrow depends on its rules (*c*).

Loans from strangers.

Unless the rules otherwise provide, the directors may borrow from persons who are not members of the society; such persons are creditors entitled, on the winding up of the society, to be paid in priority to the members of all classes, including those who have previously given notice of withdrawal (*d*).

Provision that loan shall be a first charge.

Where the rule under which a loan is contracted provides that the money borrowed shall be a first charge on the funds and property of the society generally, the lenders will not be allowed to take special securities on particular property (*e*).

Members not personally liable for money borrowed.

Directors borrowing money for a society cannot pledge the individual credit of members; any rule purporting to empower them so to do would be so far *ultra vires*, as being inconsistent with the nature of a building society under the Act (*f*).

(*a*) 6 & 7 Will. IV. c. 32. See *post*, p. 560.

(*b*) 37 & 38 Vict. c. 42, s. 7. See *post*, p. 560.

(*c*) Wurtzburg on Building Societies (4th ed.), 99.

(*d*) *Murray* v. *Scott*, 9 App. Ca. 519; *Re Mutual Aid Permanent Building Soc.*, 30 Ch. D. 434.

(*e*) *Murray* v. *Scott*, *sup.* See *Small* v. *Smith*, 10 App. Ca. 119.

(*f*) *Murray* v. *Scott*, 9 App. Ca. at p. 533. See *Re Mutual Aid Permanent Building Soc.*, *sup.*

Where rules give unlimited power to borrow.

The rules of an unincorporated building society may authorize the directors to borrow money for the purposes of the society without imposing any limit as to the amount to be so borrowed; and loans contracted under such rules are valid (*g*).

Where rules give limited power to borrow.

If the rules give to the directors of an unincorporated society a power to borrow, limited as to amount, the society will not be liable for any loan in excess of the prescribed limit (*h*). So, also, if the rules authorize the directors to raise money for certain specified purposes only, a loan for other purposes will create no liability against the society (*i*). A person lending money to the society is affected with notice of the limitation of borrowing powers imposed by the rules (*k*).

Where rules give no power to borrow.

An unincorporated society has no power to borrow money unless authorized by its rules, either expressly or by necessary implication, by reason of such borrowing being properly incident to the course and conduct of the business for its proper purposes, as indicated by the rules (*l*).

It must be borne in mind that from the 2nd November, 1874, to the 22nd April, 1875, unincorporated societies certified under the repealed Act, 6 & 7 Will. IV. c. 32, were deemed to be societies under the Act of 1874 (*m*), and accordingly had power to borrow within the limits prescribed by the later Act, though no express borrowing powers were given by the rules.

Borrowing powers acquired after date of loan.

Where a society has no power to borrow at the time of the loan, any security given for the money borrowed after borrowing powers have been obtained will be void (*n*).

Subrogation.

Where officers of a society borrow without authority, they may be entitled to the benefit of the equitable doctrine of subrogation, that is to say, that if they make payments for purposes of the society out of the borrowed moneys, they may stand in the place of the persons to whom the payments were made, and to claim against the society for the amounts so paid (*o*).

(*g*) *Murray* v. *Scott*, 9 App. Ca. 519.

(*h*) *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. D. 696, C. A.

(*i*) *Davis' Case*, L. R. 12 Eq. 516; *Moye* v. *Sparrow*, 22 L. T. 154; but see *Re Payne & Co.*, (1904) 2 Ch. 608.

(*k*) Per Baggallay, L.J., in *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. D. at p. 712. See also *Portsea Island Building Soc.* v. *Barclay*, (1894) 2 Ch. 298, C. A.

(*l*) *Cunliffe, Brooks & Co.* v. *Blackburn Benefit Building Soc.*, 9 App. Ca. 857, 865. See *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Re National Permanent Benefit Building Soc.*, *Exp. Williamson*, L. R. 5 Ch. 309; *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. D. 696, C. A.; *Exp. Watson, Re Sheffield Permanent Building Soc.*, 21 Q. B. D. 301.

(*m*) See 37 & 38 Vict. c. 42, s. 8, repealed by the Building Societies Act, 1875 (38 Vict. c. 9), s. 2.

(*n*) *Exp. Watson*, 21 Q. B. D. 301. See *Re Bottom Gate Industrial Soc.*, 40 W. R. 139.

(*o*) *Owen* v. *Roberts*, 57 L. T. 81.

Liability of directors for unauthorized borrowing.

Directors borrowing money without authority have in several cases been held personally liable for the amount borrowed even in the absence of any fraud on their part (*p*).

Repeal of former Acts, how far.

ii.—As to Incorporated Building Societies.—By the Building Societies Act, 1874 (*q*), the statute 6 & 7 Will. IV. c. 32, is repealed, but this repeal is not to affect any subsisting society certified under the repealed Act, until such society shall have obtained a certificate of incorporation under the Act of 1874 (*r*), and is not to affect its past operation, or the force or operation, validity or invalidity of anything done or suffered, or any bond or security given, or any right, title, obligation or liability accrued, or any proceedings taken, thereunder, or under the rules of any society which has been certified thereunder.

Incorporation of societies.

Every society subsisting at the date of the commencement of the Act of 1874 (*s*), or thereafter established, upon receiving a certificate of incorporation under the Act, is to become a body corporate by its registered name, having perpetual succession, until terminated or dissolved as provided in the Act, with a common seal (*t*).

The Court has no power to declare the incorporation of a society void (*u*).

Incorporated building societies, whether originally formed under the Act of 1836 or since the Act of 1874 came into operation, are governed by the Act of 1874, as amended by the Acts of 1875 (*x*), 1877 (*y*), 1884 (*z*), and 1894 (*a*), and by the regulations issued by the Secretary of State under sect. 44 of the Act of 1874.

Power to borrow.

An incorporated benefit building society has no power to borrow money, except so far as authorized by statute and by its rules (*b*); and if the limits of the power are exceeded, the loan

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See also *Baroness Wenlock* v. *River Dee Co.*, 19 Q. B. D. 155, C. A.

(*p*) *Collen* v. *Wright*, 8 E. & B. 301; *Godwin* v. *Francis*, L. R. 5 C. P. 295; *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. D. 696, C. A.; *Cross* v. *Fisher*, (1892) 1 Q. B. 467; *Firbank's Exors.* v. *Humphreys*, 18 Q. B. D. 54.

(*q*) 37 & 38 Vict. c. 42, s. 7.

(*r*) See 38 & 39 Vict. c. 9, s. 2.

(*s*) The 2nd November, 1874. See *ibid.*

(*t*) 37 & 38 Vict. c. 42, s. 9. The form of a certificate of incorporation is given in the Schedule to the Building Societies Act, 1877 (40 & 41 Vict. c. 63).

(*u*) *Glover* v. *Giles*, 18 C. D. 173.

(*x*) 38 & 39 Vict. c. 9.

(*y*) 40 & 41 Vict. c. 63.

(*z*) 47 & 48 Vict. c. 41.

(*a*) 57 & 58 Vict. c. 47.

(*b*) *Re Kent Benefit Building Soc.*, 1 Dr. & S. 417; *Re National Permanent, &c. Society*, L. R. 5 Ch. 309; *Laing* v. *Reed*, L. R. 5 Ch. 4. See *Murray* v. *Scott*, 9 A. C. 519.

will create no liability against the society (*c*), though the directors will be personally liable (*d*), and deeds, deposited as securities by a society in such a case, will not be ordered to be delivered up (*e*).

Statutory borrowing powers of incorporated societies.

The power of incorporated societies to borrow money is regulated by the 15th section of the Act of 1874, which contains the following provisions:—

"With respect to the borrowing of money by societies under this Act, the following provisions shall have effect:

(1.) Any society under this Act may receive deposits or loans at interest within the limits in this section provided from the members or other persons, or from corporate bodies, joint stock companies, or from any terminating building society, to be applied to the purposes of the society:

(2.) In a permanent society the total amount so received on deposit or loan, and not repaid by the society shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members:

(3.) In a terminating society, the total amount so received and not repaid, may either be a sum not exceeding such two-thirds as aforesaid, or a sum not exceeding twelve months' subscriptions on the shares for the time being in force:

(4.) Any deposits with or loans to a society under this Act, made before the commencement of this Act in accordance with its certified rules, are hereby declared to be valid and binding on the society; but no further deposits or loans are to be received by such society except within the limits provided by this section:

(5.) Every deposit book or acknowledgment, or security of any kind given for a deposit or loan by a society, shall have printed or written therein or thereon the whole of the 14th and 15th sections of the present Act" (*f*).

Limit of borrowing powers.

By sect. 1 (h) of the Building Societies Act, 1894 (*g*) (repealing but virtually re-enacting sect. 16 (2) of the Act of 1874), the rules of every society shall set forth whether the society intends to avail itself of the borrowing powers contained in the Act, and, if so, within what limits not exceeding the limits prescribed by the Act; and where the original rules of a society are altered, the altered rules must similarly set forth whether the society intend to borrow.

(*c*) *Moye* v. *Sparrow*, 18 W. R. 400; *Re Durham County Bldg. Soc.*, L. R. 12 Eq. 516. But see Wurtzburg, p. 108.

(*d*) Wurtzburg (4th ed.), p. 83.

(*e*) *Wilson's Case*, L. R. 12 Eq. 516.

(*f*) Sect. 14 relates to the liability of members.

(*g*) Regulations of 1884, r. 5.

Personal liability of directors for exceeding powers.

Sect. 43 provides that "if any society under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess" (*h*).

Alternative limits in case of terminating society.

A terminating society may adopt by its rules either of the two alternative limits provided by sect. 15, but the alternative so adopted will be the limit prescribed by the Act within the meaning of sect. 43; if such limit is exceeded, the directors will be liable for the excess, even though the other alternative limit is not exceeded (*i*).

Amount for the time being secured by mortgages from members.

In ascertaining the "amount for the time being secured to the society by mortgages from its members" within the meaning of sect. 15, sub-sect. 2, such amount is not to be restricted to the amount of principal secured, but includes the whole amount due on the securities of members at the time of the loan to the society for principal, interest, fines, or otherwise, and all instalments not then due, secured by the mortgages (*k*); and that whether or not the advances so secured were made in respect of shares (*l*).

Amount borrowed.

In ascertaining the limits of the statutory power of borrowing, the total amount borrowed from all sources must be included (*m*).

Overdrawn banking account.

An overdrawn account with a banker secured by deposit of title deeds is a loan within sect. 15 of the Act (*n*).

By sect. 14 of the Building Societies Act of 1894 (*o*), it is enacted as follows:—

Limits of borrowing power.

"In calculating the amount for the time being secured to a society under the Building Societies Acts by mortgages from its members for the purpose of ascertaining the limits of its power to receive deposits or loans at interest, the amount secured on properties, the payments in respect of which were upwards of twelve months in arrear at the date of the society's last preceding annual account and statement, and the amount secured on properties of which the society had been twelve months in possession at the date of such account and statement, shall be disregarded.

(*h*) See *Cross* v. *Fisher*, (1892) 1 Q. B. 467.

(*i*) *Looker* v. *Wrigley*, 9 Q. B. D. 397.

(*k*) *Neath Building Soc.* v. *Luce*, 43 Ch. D. 158.

(*l*) *Exp. Johnson and Greenwood*, 45 Ch. D. 463.

(*m*) *Ibid.*

(*n*) *Looker* v. *Wrigley*, 9 Q. B. D. 397; *Cunliffe, Brooks & Co.* v. *Blackburn Building Soc.*, 9 App. Ca. 857.

(*o*) 57 & 58 Vict. c. 47.

"Provided that this section shall not affect the validity of any deposit or loan which was within the limit provided by law at the time when it was received, and, so far as regards any amount secured either on properties, the payments in respect of which are upwards of twelve months in arrear at the passing of this Act, or on properties in the possession of the society at the passing of this Act, shall not come into operation until the expiration of three years from the passing of this Act."

Securities by building societies.

It is to be observed that neither the Act of 1836 nor the Act of 1874 expressly empowered building societies to mortgage their property as a security for deposits or loans, but the reference to "securities" in sect. 15 appears impliedly to give this power, and the existence of the power is, in practice, assumed without question (*p*).

Enforcement of security.

Securities given by a building society may be enforced against the society, although sects. 14 and 15 are not endorsed thereon. Sub-sect. (5) of sect. 15 of the Act of 1874 is directory only, and an omission to comply with its requirements will not vitiate a security given by a building society for a loan (*q*).

Power to hold land and mortgage.

iii.—As to Friendly Societies.—By the Friendly Societies Act, 1896 (*r*), a friendly society, or any branch of such society, may, if the rules thereof so provide (and with a limitation as to benevolent societies), hold, purchase, or take on lease, any land in the names of its trustees for the time being, and may mortgage the same, and no mortgagee shall be bound to inquire as to the authority for any mortgage by the trustees, and the receipt of the trustees shall be a discharge for all moneys arising from or in connection with such mortgage.

(*p*) See also sect. 19 of the Act of 1874.

(*q*) *Re Guardian Permanent Benefit Building Soc., Hawkins' Case*, 23 Ch. D. 440, 452, C. A.

(*r*) 59 & 60 Vict. c. 25, s. 47.

CHAPTER XXVII.

MORTGAGES BY COMPANIES.

SECTION I.

BORROWING POWERS OF COMPANIES.

Distinction between companies incorporated by charter and by statute.

1. Of the Power of Companies to Borrow generally.—With regard to the powers of companies to borrow money on mortgage, a distinction must be drawn between companies which are incorporated by charter, and companies which are created by statute (*a*).

Charter companies.

Companies incorporated by charter, being corporations at common law, may, by instruments under their common seal, except so far as prohibited or controlled by their charter of incorporation, dispose of their property, by way of mortgage or otherwise, as freely and fully as individuals (*b*).

Statutory companies.

But statutory companies, whether created by private Acts or under the general Companies Acts, are not common law corporations, and, accordingly, derive their powers of mortgaging or otherwise dealing with their property from their instruments of incorporation. Companies of the former class, therefore, have no powers beyond such as are expressly or by necessary implication conferred by the special Acts to which they owe their existence (*c*). But if no express borrowing powers are given by the particular Act such powers may be implied, if the raising of money by loan is necessary for the furtherance of the objects of the company as defined by that Act (*d*).

(*a*) See Buckley on Companies (6th ed.), p. 15.

(*b*) *Sutton's Hospital Case*, 10 Rep. 1; *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. 224, 263.

(*c*) *Lady Wenlock* v. *River Dee Co.*, 38 Ch. D. 534, C. A.

(*d*) Per Lord Cranworth in *Hawkes* v. *Eastern Counties Rail. Co.*, 5 H. L. C. 331; per Lord Selborne in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, 22 Ch. D. 61, at p. 70, C. A. And see per Lord Blackburn in *Lady Wenlock* v. *River Dee Co.*, 10 App. Ca. 354, at p. 360.

An ordinary joint stock company has no powers except such as are expressly or by implication conferred by its memorandum of association (*e*).

Joint stock companies.

Mortgages by railway companies.

ii.—Borrowing Powers of Railway and other Companies incorporated by Special Acts.—By the Railways Regulation Act, 1844 (*f*), railway companies are prohibited under penalties from issuing loan notes and other securities for money advanced to them, otherwise than under the provisions of Acts of Parliament authorizing such companies to raise such money and to issue such securities.

By this Act the borrowing of money by railway companies otherwise than in conformity with the terms of their special Act is impliedly forbidden (*g*).

Mortgages by canal companies.

By 10 & 11 Vict. c. 94, canal and navigation companies who have adopted 8 & 9 Vict. c. 42, for enabling them to become carriers upon their canals, are authorized to borrow sums, not exceeding one-tenth of the paid-up capital, for the purposes of that Act, in like manner as provided by 8 & 9 Vict. c. 16.

Regulations as to mortgages by companies constituted by special Acts.

The Companies Clauses Consolidation Act, 1845 (*h*), which has been incorporated with many railway and other special Acts, contains provisions regulating the borrowing of money on mortgage or bond by companies constituted by special Acts. The effect of these provisions may be shortly stated as follows:—Companies authorized by their special Acts to borrow on mortgage or bond, may, subject to the restrictions contained in their special Acts, borrow on mortgage or bond such sums as shall from time to time, by an order of a general meeting of the company, be authorized to be borrowed, not exceeding in the whole the amount prescribed by the special Act, and, for securing the repayment of the money borrowed, may mortgage the undertaking and future calls on the shareholders or give bonds (sect. 38). After paying off any money so borrowed, the company may in like manner re-borrow the amount paid off (sect. 39). The company is restricted from borrowing without production of a justice's certificate that a definite

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(*e*) Per Lord Selborne in *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. at p. 693. See *infra*, p. 475.

(*f*) 7 & 8 Vict. c. 85, s. 19.

(*g*) *Chambers* v. *Manchester, &c. Rail. Co.*, 5 B. & S. 588.

(*h*) 8 & 9 Vict. c. 16, ss. 38—55. This Act applies to every company incorporated after the passing thereof by any special Act, save so far as expressly varied or excepted by such Act. See sect. 1 of the Act.

portion of the capital is subscribed or paid up (sect. 40). The mortgage or bond is to be by deed, duly stamped, and wherein the consideration shall be truly stated (*i*), and may be according to the form in the schedule C. or D. of the Act (sect. 41). Sect. 42 contains provisions for apportioning the tolls, &c., comprised in mortgages among the different mortgagees *pro ratâ* according to the sums respectively advanced by them without regard to priority of dates (*k*); and sect. 43 provides that no mortgage of future calls shall, unless expressly so provided, preclude the application of such calls for the purposes of the company. A register of mortgages and bonds is to be kept by the secretary (sect. 45). Transfers of mortgages and bonds are to be by deed, duly stamped, and may be according to the form in schedule E. of the Act (sect. 46). Transfers are to be registered (sect. 47). Interest is to be payable half-yearly unless otherwise agreed, and in preference to dividends (sect. 48). Transfers of interest are to be by deed, duly stamped (sect. 49). A time may be fixed for repayment, upon the expiration of which principal and arrears of interest will become payable on demand, and unless otherwise stipulated, at the office of the company (sect. 50). Where no time is fixed, the principal and any arrears of interest will be repayable after the expiration of twelve months from the date of the mortgage or bond, upon six months' notice in writing or print by either party (sect. 51). Interest is to cease on the expiration of the notice (sect. 52). The appointment of a receiver is provided for by sects. 53 and 54; and sect. 55 provides that the account books of the company shall be open to the inspection of the mortgagees.

Mortgage of surplus lands.

A railway company may lawfully raise money on the security of its surplus lands as well as on the security of the sale money and rents and profits of their surplus lands, irrespective of the borrowing powers under their Act (*l*).

(*i*) The consideration, if apparent, need not be stated in terms: *Landowners, &c. Drainage Co.* v. *Ashford*, 16 Ch. D. 412.

(*k*) In *Perkins* v. *Deptford Pier Co.*, 13 Sim. 277, a similar provision in a special Act was held merely to regulate the rights of mortgagees of the tolls, &c. as between themselves, and not to affect the rights of a prior mortgagee of the lands of the company. See *Pontet* v. *Basingstoke Canal Co.*, 3 Bing. N. C. 433; *Pardoe* v. *Price*, 16 M. & W. 267.

(*l*) *Imperial Mercantile, &c. Assoc.* v. *London, Chatham and Dover Rail. Co.*, 15 W. R. 1187; *Gardner* v. *London, Chatham and Dover Rail. Co.*, L. R. 2 Ch. 201: *Stagg* v. *Medway Navigation*, (1903) 1 Ch. 169, C. A.

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Re-borrowing.

Money paid off on a debenture of a railway company could not have been re-borrowed without the authority of a general meeting, unless the money were so re-borrowed to pay off any existing mortgage or bond (*m*). But now, money borrowed to pay off debentures falling due is deemed money borrowed under statutory powers without any general meeting, as to railway companies (*n*) and as to other companies (*o*).

Liability for loans in excess of borrowing powers under special Act.

Where debentures are issued contrary to statutory enactment equity can give no relief against the illegality (*p*); and debentures issued in excess of the limit authorized by a special Act are void (*q*), but the directors would be personally liable, if the loans were issued under their authority and paid to their agents (*r*).

A railway company, having power to borrow on mortgage or bond, has power to borrow on debenture stock, even though its special Act does not incorporate Part 3 of the Companies Clauses Act, 1863 (*s*).

Power of companies formed under the Companies Acts depends on objects as defined in memorandum.

iii.—Borrowing Powers of Joint Stock Companies.—In the case of companies formed under the Companies Acts, the authority of a company to borrow money depends on its objects and the nature of its business as defined in its memorandum of association, including in such definition the general clause empowering the company to do all things "incidental or conducive to" its special objects (*t*). It has been expressly held that a company cannot, even by apt and unambiguous words in the memorandum, reserve to itself powers, such as a power to reduce its shares, whereby the original conditions contained in the memorandum would be altered (*u*); and the principle that

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(*m*) 8 & 9 Vict. c. 16, s. 39. See *Fountaine* v. *Carmarthen Rail. Co.*, L. R. 5 Eq. 316.

(*n*) 30 & 31 Vict. c. 127, s. 26.

(*o*) 32 & 33 Vict. c. 48, s. 4. See *Weeks* v. *Propert*, L. R. 8 C. P. 434.

(*p*) *Re Cork & Youghal Rail. Co.*, L. R. 4 Ch. 748, 762. See *Wrexham Mold Railway*, *post*, p. 482.

(*q*) *Fountaine* v. *Carmarthen Rail. Co.*, L. R. 5 Eq. 316; *Chambers* v. *Manchester, &c. Rail. Co.*, 5 B. & S. 588; *Chapleo* v. *Brunswick, &c. Soc.*, 6 Q. B. D. 696, C. A.; *Whitehaven Joint Stock Banking Co.* v. *Reed*, 54 L. T. 360, C. A.; *Firbank's Executors* v. *Humphreys*, 18 Q. B. D. 54, C. A. And see *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145.

(*r*) *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. D. 696, C. A.

(*s*) *Re Mersey Rail. Co.*, (1895) 2 Ch. 287.

(*t*) See sect. 41 of the Companies Act, 1908. And see per Lord Cairns, C., in *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653, at p. 673.

(*u*) *Re Financial Corporation, Holme's Case*, L. R. 2 Ch. 714, 733.

a contract upon a matter not included in a memorandum cannot be supported has been repeatedly recognized by the Courts (*x*).

Express power to borrow.

The borrowing of money may be expressly specified as one of the objects of the company; and where a company had power by its memorandum to "dispose of" its lands, a mortgage on its lands, given to its bankers to secure an overdraft, was held valid (*y*).

Power to alter memorandum.

A company may, by sect. 9 of the Companies Act, 1908 (*z*), with the sanction of the Court, alter the provisions of its memorandum of association or deed of settlement, so as (among other things) to carry on its business more economically or more efficiently, or to attain its main purpose by new or improved means; and the Court may sanction an alteration so as to enable the company to issue debentures (*a*).

Power implied by nature of business.

In some cases a power is implied from the character of the business carried on by the company, as in the case of a mortgage of ships by a shipping company (*b*), or in the case of a mortgage by an insurance company for meeting pressing demands (*c*); and a trading company has general power to borrow money to such an extent as is reasonable and necessary for the purposes of the business, and may mortgage or charge any part of its property to secure the money so borrowed, although no express power to borrow or mortgage is given (*d*).

Banking companies.

So also, mortgages given by banking companies for moneys advanced to them have been upheld on the ground that a power to borrow money and to give securities for the same is necessarily incident to the business of bankers (*e*).

Power implied by necessity.

It seems to be a general principle that where property of a company is liable to be taken in execution, the company can by an implied power anticipate that event by making such property a security for the debt (*f*).

Extent of the borrowing

Where a company, incorporated either by a special Act or

(*x*) *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. 224, at pp. 291 *et seq.*; *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653: *Re German Date Co.*, 20 Ch. D. 169, 180; *Trevor* v. *Whitworth*, 12 App. Ca. 409, 417, 433.

(*y*) *Re Patent File Co.*, L. R. 6 Ch. 83.

(*z*) 8 Edw. VII. c. 69.

(*a*) *Re Reversionary Interest Soc.*, (No. 1), (1892) 1 Ch. 615.

(*b*) *Re Australian Steam Clipper Co.*, 4 K. & J. 733; *English Channel Steamship Co.* v. *Rolt*, 17 Ch. D. 715.

(*c*) *Gibb's Case*, L. R. 10 Eq. 312.

(*d*) *Peruvian Railways Co.* v. *Thames, &c. Co.*, L. R. 2 Ch. 617; *Re Hamilton's Windsor Ironworks Co.*, 12 Ch. D. 707; *General Auction Estate, &c. Co.* v. *Smith*, (1891) 3 Ch. 432; *Jackson* v. *Rainford Coal Co.*, (1896) 2 Ch. 340.

(*e*) *Bank of Australia* v. *Breillat*, 6 Moo. P. C. 152, 195.

(*f*) *Stagg* v. *Medway Navigation*, (1903) 1 Ch. 169, C. A.; *Reeve* v. *Medway Navigation*, (1905) W. N. 75.

under the Companies Acts, has express or implied powers of borrowing, they may give a security for a present advance or for a past debt (*g*). A debt incurred before incorporation of a company may be the subject of a mortgage (*h*).

powers of companies generally.

Memorandum limiting amount to be borrowed.

If by the memorandum of association or deed of settlement the borrowing powers of a company are restricted to a specified amount or exerciseable on certain conditions, money cannot be borrowed to a greater amount, or except on those conditions (*i*). So, where a deed of settlement of a company provided that money might be borrowed on a resolution of the board of directors, and that every mortgage was to be sealed with the seal of the company, it was held that a mortgage not complying with these requirements was invalid (*k*). But it was held later, that under the same deed of settlement the company was not precluded from giving an equitable charge by deposit, authorized by resolution of the board of directors, as security for a debt due to the bankers of the company (*l*).

Power of re-borrowing.

Where a company has powers of borrowing up to a limited amount, and some of its securities are paid off, it may give mortgages or debentures instead or in renewal of the old securities, provided that the total prescribed limit is not exceeded, and that the new issue is in conformity with statutory provisions and the regulations of the company (*m*).

Time when powers may be exercised.

In the absence of any restrictive provisions, the borrowing powers of a limited company may be exercised, at any time after the commencement of business, without reference to the amount of capital which may have been subscribed (*n*).

A company, with certain exceptions, cannot exercise any borrowing power until it becomes entitled to commence business (*o*), but it may offer debentures or debenture stock for subscription simultaneously with shares and receive money

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(*g*) *Re Inns of Court Hotel Co.*, L. R. 6 Eq. 82; *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156.

(*h*) *Scott* v. *Colbourn*, 26 Beav. 276. See *Re Bagnalstown and Wexford Rail. Co.*, Ir. R. 4 Eq. 505.

(*i*) *Lady Wenlock* v. *River Dee Co.*, 10 App. Ca. 354. See *Re Pooley Hall Colliery Co.*, 18 W. R. 201; *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653; *Att.-Gen.* v. *Great Eastern Rail. Co.*, 5 App. Ca. 473, at p. 481; *English Channel Steamship Co.* v. *Rolt*, 17 Ch. D. 715.

(*k*) *Re General Provident Ass. Co.*, 38 L. J. Ch. 320.

(*l*) *Re General Provident Ass. Co.*, *Exp. National Bank*, L. R. 14 Eq. 507.

(*m*) *Fountaine* v. *Carmarthen Rail. Co.*, L. R. 5 Eq. 316. See *Irvine* v. *Union Bank of Australia*, 2 App. Ca. 366.

(*n*) *Macdougall* v. *Jersey, &c. Co.*, 2 H. & M. 528.

(*o*) 8 Edw. VII. c. 69, s. 87.

payable on application for debentures (*p*). Directors borrowing or persons lending to a newly formed company should call for the production of the registrar's certificate that the company is entitled to commence business (*q*). A company must within two months after allotment of debentures or debenture stock complete and have ready for delivery the debentures or certificates of stock, unless the conditions of the issue otherwise provide (*r*).

Power to borrow "on mortgage" includes equitable charge.

A power given by the memorandum to borrow "on mortgage" will authorize the giving of an equitable charge to secure a loan, as by deposit of deeds (*s*); and the same rule will apparently apply whether the borrowing powers of the company are express or are to be implied from the nature of its business (*t*). A security which shows an intention to create a charge on the property of the company may be enforceable in equity though defective as a legal mortgage (*u*).

Articles cannot confer borrowing powers.

If a company has no power of borrowing expressly given by its memorandum of association, or necessarily implied from the nature of its business, it cannot confer such a power on itself, or on its directors, by its articles of association. A contract by a company or its directors, not authorized by its memorandum, is wholly null and void, and cannot be rendered binding on the company even by the assent of every individual shareholder (*x*).

Articles may regulate mode of exercising such powers.

But the memorandum and articles are to be read as one document (*y*), and the latter may be referred to for the purpose of explaining or supplementing the former (*z*). Accordingly, if a company has power to borrow by virtue of its memorandum, the articles may regulate the mode of exercising the power by prescribing the limits within which, and the persons by whom, the power is to be exercised, and the formalities to be observed in exercising the power.

(*p*) 8 Edw. VII. c. 69, s. 87, sub-s. 4.

(*q*) *Ibid.* sub-sect. 2.

(*r*) *Ibid.* sect. 92.

(*s*) *Re Patent File Co.*, L. R. 6 Ch. 83.

(*t*) See *Athenæum Life Ass. Soc.*, 4 K. & J. 549, 562; *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. 224, at pp. 264, 292; *Gibb's Case*, L. R. 10 Eq. 312; *Exp. National Bank*, L. R. 14 Eq. 507; *Re Hamilton's Windsor Ironworks Co.*, 12 Ch. D. 707.

(*u*) *Re Strand Music Hall Co.*, 3 De G. J. & S. 147; *Ross* v. *Army and Navy Hotel Co.*, 34 Ch. D. 43, C. A.; *Re Queensland Land and Coal Co.*, (1894) 3 Ch. 181.

(*x*) *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653.

(*y*) *Guiness* v. *Land Corp. of Ireland*, 22 Ch. D. 349, 377, 381, C. A.

(*z*) *Harrison* v. *Mexican Rail. Co.*, L. R. 19 Eq. 358; *Re Phœnix Bessemer Co.*, 44 L. J. Ch. 638; *London Financial Assoc.* v. *Kelk*, 26 Ch. D. 107, 133; *Re South Durham Brewery Co.*, 31 Ch. D. 261, C. A.; *Re Tilbury Portland Cement Co.*, 62 L. J. Ch. 814.

Special resolution.

The want of a provision in the articles as to the mode of exercising the power may be supplied by a special resolution under sects. 13 and 69 of the Companies Act, 1908 (*a*). And articles limiting the amount to be borrowed may be similarly extended (*b*).

Articles limiting amount to be borrowed.

Where a memorandum of association gave to the company a power of borrowing without limit, but the articles provided that the directors should have power to borrow on the security of the assets of the company to an amount not exceeding two-thirds of the capital of the company for the time being not called up, it was held that in computing the limit "capital not called up" included shares which had not been issued (*c*).

Issue of debentures at a discount.

Primâ facie a company, having power to borrow on such terms as they think fit, may issue debentures or debenture stock at a discount, and this power may be exercised by the directors where they have the general powers of the company (*d*); but the power of issuing debentures at a discount may be negatived or restricted by the articles of association or otherwise.

If it be part of the terms that the debentures issued at a discount may be exchanged for shares fully paid to the face value of the debentures, this may render the issue void as being the issue of shares at a discount (*e*).

Debentures may be deposited by a company by way of mortgage to secure a loan of an amount less than the par value thereof with power for the depositee to sell them; the depositee or his assignee will be entitled on a winding up to prove for the full amount secured *pari passu* with the other debenture holders (*f*).

A company cannot issue fully paid bonus shares as an inducement to take up debentures, and the allottees will be liable to the full nominal value of the shares (*g*).

Where debentures were made redeemable at a premium if the company should be reconstructed, but otherwise at par, it was held that the condition must be strictly construed, and that on

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(*a*) 8 Edw. VII. c. 69. See *Bryon* v. *Metropolitan Saloon, &c. Co.*, 3 De G. & J. 123.

(*b*) *Jackson* v. *Rainford Coal Co.*, (1896) 2 Ch. 340.

(*c*) *English Channel Steamship Co.* v. *Rolt*, 17 Ch. D. 715.

(*d*) *Re Regent's Canal Ironworks Co.*, 3 Ch. D. 43, C. A.; *Campbell's Case*, 4 Ch. D. 470; *Webb* v. *Shropshire Rail. Co.*, (1893) 3 Ch. 307, C. A.

(*e*) *Moseley* v. *Koffyfontein Mines*, (1904) 2 Ch. 108.

(*f*) *Re Regent's Canal Ironworks Co.*, 3 Ch. D. 43, C. A.

(*g*) *Re Railways Time Tables Co.*, *Exp. Welton*, 62 L. J. Ch. 935, C. A.

the amalgamation of the borrowing company with another company the debentures were redeemable at par (*h*).

The Court in construing a debenture cannot refer to the prospectus (*i*).

Liability of directors for excessive exercise of powers.

If borrowing powers have been exceeded, and the transaction is void as against the company, the directors will be personally liable (*k*).

If directors borrow money expressly to "replace loans falling due," and they have at the time exhausted their powers, they are liable as for a breach of warranty (*l*); and so where a company has no power to accept bills, and the directors accept "on behalf of the company," they are personally liable (*m*); and if directors hold out an agent as authorized to borrow, they are personally liable (*n*); but an incorrect statement of a matter of law would not render the directors liable (*o*).

Parol evidence, how far admissible.

If directors sign a document borrowing money for the company, parol evidence is admissible to explain the ambiguity, whether their signature made them personally liable (*p*).

Borrowing powers exerciseable by directors.

The power of borrowing money on behalf of a company is, according to the usual practice, vested by the articles of association in the directors. And by Article 71 of Table A., appended to the Companies Act (*q*), which is applicable to all companies limited by shares formed under the Companies Act, except so far as excluded or modified by articles of association (*r*), a general authority is given to the directors to exercise the borrowing powers of the company, except so far as otherwise directed by statute or by the regulations of the company (*s*).

Mortgage by directors to one of themselves.

There is no objection to a director advancing his own money to his company, and taking from it debentures or other security

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(*h*) *Hooper* v. *Western Counties, &c. Telephone Co.*, 68 L. T. 591.

(*i*) *Re Tewkesbury Gas Co.*, (1911) 2 Ch. 279, per Parker, J.

(*k*) *Firbank's Executors* v. *Humphreys*, 18 Q. B. D. 54, C. A. See *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 360, C. A.

(*l*) *Weeks* v. *Propert*, L. R. 8 C. P. 427; *Whitehaven Joint Stock Banking Co.* v. *Reed*, 54 L. T. 360, C. A. See *Wrexham, Mold, &c. Railway*, (1890) 1 Ch. 440.

(*m*) *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 360, C. A.

(*n*) *Chapleo* v. *Brunswick, &c. Co.*, 6 Q. B. D. 696, C. A.

(*o*) *Rashdall* v. *Ford*, L. R. 2 Eq. 750; *Eaglesfield* v. *Marquis of Londonderry*, 4 Ch. D. 693; affd. in H. L. 26 W. R. 540. See *Cargill* v. *Bower*, 10 Ch. D. 516.

(*p*) *McCollin* v. *Gilpin*, 6 Q. B. D. 516.

(*q*) 8 Edw. VII. c. 69.

(*r*) *Ibid.* sect. 11.

(*s*) See *Spackman* v. *Evans*, L. R. 3 H. L. 171, 244; *Re West of England Bank, Exp. Booker*, 14 Ch. D. 317, C. A.

for the loan; and if debentures are issued at a discount to the public, a director may take them at such discount value (*t*).

Concurrent powers of company and directors.

If a company has, by its memorandum of association, or by reason of the exigencies of its business, a power to borrow, which is by the articles exerciseable by an extraordinary general meeting, such power will not be restrained by a clause in the articles giving to the directors power to borrow only to a limited amount (*u*).

Ratification of *ultra vires* loan.

If in such a case the directors exceed their authority, the company may, by ratifying the transaction, render it valid (*x*).

Loan before formation of company.

So, also, though acts done before the formation of a company cannot be, strictly speaking, ratified—for ratification implies an existing relation of principal and agent, and where there is no principal there can be no agent—yet a company may, after its formation, adopt such acts so as to bind itself. Thus a company may be bound by debentures issued by it pursuant to an arrangement made on its behalf before its formation (*y*). But the company is not bound by a resolution of the directors purporting to adopt such acts (*z*).

Ultra vires transactions not generally binding.

iv.—Whether Securities which are ultra vires will bind Companies.—Generally a corporation created for particular purposes is not bound at law by a deed under the corporate seal, where, by the express provision of, or necessary implication from, the statute which creates the corporation, the deed is *ultra vires* (*a*).

Ultra vires loans, when valid to extent of advances.

But though a company may have no power to borrow money, and the securities may be consequently void, yet if the moneys advanced have been properly applied in payment of a legitimate debt of the company, the holders of the securities, whether directors or others, can recover such advances with interest (*b*). The principle of these cases is not, as was at one time sup-

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(*t*) *Campbell's Case*, 4 Ch. D. 470. See *Southampton, &c. Boat Co.* v. *Pinnock*, 12 W. R. 330.

(*u*) *Re Strand Music Hall Co.*, 3 De G. J. & S. 147.

(*x*) *Irvine* v. *Union Bank of Australia*, 2 App. Ca. 366; *Grant* v. *United Kingdom Switchback Co.*, 40 Ch. D. 135, C. A.

(*y*) *Howard* v. *Patent Ivory Manufacturing Co.*, 38 Ch. D. 156. But see *Bagot Co.* v. *Clipper Co.*, (1901) 1 Ch. 196, C. A.

(*z*) *North Sydney Investment Co.* v. *Higgins*, (1899) A. C. 263.

(*a*) *South Yorkshire, &c. Co.* v. *Great Northern Rail. Co.*, 9 Exch. 55.

(*b*) *Re Magdalena, &c. Steam Co.*, John. 690; *Re Cork and Youghal Rail. Co.*, L. R. 4 Ch. 748; *Troup's Case*, 29 Beav. 553; *Hoare's Case*, 30 Beav. 225; *Re Beulah Park Estate*, L. R. 15 Eq. 43; *International Life Ass. Co.*, L. R. 10 Eq. 312.

posed (*c*), that the lender is entitled to be subrogated to the rights of the creditor whose debt has been paid out of his loan, but that the lender is merely entitled to have his loan treated as valid to the extent to which it has been so applied. The lender is therefore not entitled to the benefit of securities held by the creditor so paid off or of his priority over other creditors (*d*).

Sale and hiring of rolling stock.

A company, though prohibited from borrowing, may lawfully attain that object by a sale and repurchase. So where a company having no borrowing powers raised money by sale of rolling stock to a waggon company, at the same time making a contract with the waggon company for the hire of the rolling stock at a rent which would repay the amount of the purchase-money with interest in five years, and for its repurchase at the expiration of that period at a nominal price, the transaction was upheld as *bonâ fide*, and, therefore, valid (*e*).

Debentures for benefit of directors.

If directors issue debentures for their own benefit, not for that of the company, they will be liable to return any benefits received by them (*f*).

Debentures issued in payment of debts taken over from founder.

Where directors having power to raise money issued debentures in satisfaction of certain debts of the vendor of the business which the company was formed to take over under an agreement by the company to indemnify the vendor against such debts, amongst which was a debt due to the managing director of the company; it was held that under the circumstances the debentures were issued for the benefit of the company, and were accordingly valid (*g*).

Where sums have been voted to promoters and directors, who take out the sums in debentures, the sums, being misappropriations, must be repaid, and the debentures will remain valid in the hands of holders without notice of the fraud (*h*).

Estoppel.

The company are estopped from disputing irregular debentures if they are valid on their face and assignable (*i*), especially if the company have registered or accepted notice of the assignment thereof, or paid interest thereon (*k*), or have dealt with

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(*c*) *Re National Permanent, &c. Soc.*, L. R. 5 Ch. 309, 313; *Wenlock* v. *River Dee Co.*, 19 Q. B. D. 155, 165.

(*d*) *Wrexham, Mold, &c. Railway*, (1899) 1 Ch. 440, C. A.

(*e*) *Yorkshire, &c. Waggon Co.* v. *Maclure*, 21 Ch. D. 309, C. A.; *Coveney* v. *Persse*, (1910) 1 Ir. R. 194, 211.

(*f*) *London Trust Co.* v. *Mackenzie*, 62 L. J. Ch. 870.

(*g*) *Seligman* v. *Prince & Co.*, (1895) 2 Ch. 617, C. A.

(*h*) *Re Anglo-French Co-operative Soc.*, 21 Ch. D. 492, C. A.

(*i*) *Webb* v. *Commissioners of Herne Bay*, L. R. 5 Q. B. 642.

(*k*) *Brunton's Claim*, L. R. 19 Eq. 302; *Re Northern Assam Tea Co.*, L. R. 10 Eq. 458; *Exp. Chorley*, L. R. 11 Eq. 157.

the assignee, as by asking for time (*l*). Where debentures have been issued irregularly, the company are estopped from setting up the irregularity against holders for value without notice who have had them registered (*m*), and also against equitable transferees who had no reason to suspect any irregularity, but only to the extent of their *bonâ fide* advances (*n*).

Fraud of director.

In one case, where debentures had been issued through the fraud of the managing director, and repudiated by the company as soon as the fraud was discovered, it was held that the company were entitled to repudiate the debentures on the ground that the debentures in question were choses in action not assignable at law, so that the assignee could not stand in any better position than the original holder, and must take subject to the equities which affected the assignor (*o*); but the correctness of this decision has been questioned as regards the application to that case of the general rule on which it purported to be grounded (*p*).

Whether lender must require evidence as to propriety of loan.

The holders of valid debentures of a company are not estopped from disputing the validity of other debentures which have been improperly or irregularly issued (*q*).

Where a company or its directors have power to borrow in manner provided by its articles, the lender may assume that all such preliminary acts as the passing of resolutions, &c., have been done as the deed of settlement or articles require; but where the statutory authority provides specially what shall be evidence of the performance of the preliminary acts, the lender must see that they are properly done (*r*).

Where money is borrowed by a company within the limits of its powers, there is no obligation on the lender to inquire for what purpose the borrowing is made or whether the money is to be applied for objects within the powers of the borrowing company (*s*).

(*l*) *Hulett's Case*, 2 J. & H. 306.

(*m*) *Romford Canal Co., Carew's Claim*, 24 Ch. D. 85.

(*n*) *Pocock's Claim*, 24 Ch. D. 85. See also *Shaw* v. *Port Philip, &c. Co.*, 13 Q. B. D. 103 (forged share certificate).

(*o*) *Athenæum Life Ass. Soc.* v. *Pooley*, 3 De G. & J. 294. See also *Re Natal Investment Co.*, L. R. 3 Ch. 355.

(*p*) *Re Hercules Ins. Co., Brunton's Claim*, L. R. 19 Eq. 302, at p. 312, per Malins, V.-C.

(*q*) *Mowatt* v. *Castle Steel and Ironworks Co.*, 34 Ch. D. 58, C. A.; *Re Tasker & Sons*, (1905) 2 Ch. 587.

(*r*) *Royal British Bank* v. *Turquand*, 6 E. & B. 327; *Agar* v. *Athenæum Life Ass. Soc.*, 3 C. B. N. S. 725; *Fountaine* v. *Carmarthen Rail. Co.*, L. R. 5 Eq. 316; *Davies* v. *Bolton & Co.*, (1894) 3 Ch. 678; *County of Gloucester Bank* v. *Rudry*, (1895) 1 Ch. 629, C. A.

(*s*) *Re Payne & Co.*, (1904) 2 Ch. 608.

Rule where borrowing powers are limited as to amount.

This rule, however, does not apply where the power of the company itself, as distinguished from that of its directors, is limited in point of amount; in such a case, the lender is not entitled to assume that the prescribed amount is not being exceeded (*t*); and if the company subsequently acquires further borrowing powers, it cannot, by exercise of those powers, secure the previous advance, which was never a debt binding on the company (*u*).

Statement of the rule.

The rule here referred to is thus explained by Lord Hatherley:—"The company entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which, by its articles of association, it appears to possess; and all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them and them only; subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted by the articles of association" (*x*).

Bonâ fide holder for value may enforce irregular securities.

Irregular securities, or securities for an illegal purpose, issued by a company to strangers without notice, may be enforced by them (*y*). So, where a company was empowered to borrow on mortgage such sums as might be authorized by a general meeting, and issued debentures without the sanction of a general meeting, it was held that the proviso requiring such sanction was merely directory, and not one which it was obligatory on the debenture holders, in order to support their security, to show had been performed by the company (*z*).

So a registered debenture, though irregular, is a valid security as against the company in the hands of a transferee for value without notice of any defect in it (*a*).

Quorum of directors.

So, where the directors of a company had power under the articles to fix a quorum, and by resolution fixed three as a quorum, and, at a meeting of the directors at which only two

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(*t*) *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. D. 696, C. A.; *Lady Wenlock* v. *River Dee Co.*, 10 App. Ca. 354.

(*u*) See *Exp. Watson*, 21 Q. B. D. 301.

(*x*) *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869, at p. 893. See *Ernest* v. *Nicholls*, 6 H. L. C. 401; *Royal British Bank* v. *Turquand*, 6 E. & B. 327; *Biggerstaff* v. *Rowatt's Wharf, Limtd.*, (1896) 2 Ch. 93, C. A.

(*y*) *Bryon* v. *Metropolitan Saloon Co.*, 3 De G. & J. 123; *Fountaine* v. *Carmarthen Rail. Co.*, L. R. 5 Eq. 316, 322; *Re Marseilles Extension Rail. Co.*, L. R. 7 Ch. 161.

(*z*) *Landowners, &c. Co.* v. *Ashford*, 16 Ch. D. 412.

(*a*) *Re Renshaw & Co.*, (1908) W. N. 210.

were present, the seal of the company was affixed to a mortgage, it was held that as between the company and the mortgagees who had no notice of the irregularity, the execution of the deed was valid (*b*).

Informal and incomplete charges supported in equity.

In some instances, where resolutions of a company or of its directors have authorized a loan, but no formal or complete mortgage has been made, the Courts have held that the effect of the resolutions was to create valid equitable charges (*c*). But where there are no minutes authorizing the loan (*d*), or where the holder has notice of the irregularity (*e*), or where the resolution purporting to create the charge has not been communicated to the creditor (*f*), no charge is created.

Where the form given by the Act was not followed, the mortgage was notwithstanding valid against a creditor (*g*); and where certain formalities were required by the articles, a deposit of title deeds and a memorandum signed by the manager, though with authority, were held invalid; but the deeds were not ordered to be delivered up (*h*). And so the power, though informally exercised, has been held sufficient; as where directors being empowered to raise money by debentures, gave them to a contractor for the cost of work done, instead of issuing them to him for money and then handing him back the amount (*i*).

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SECTION II.

DIFFERENT KINDS OF SECURITIES GIVEN BY COMPANIES.

Companies' securities.

i.—**Mortgages, &c. by Companies generally.**—The securities given by companies are mortgages, debentures, debenture stock,

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(*b*) *County of Gloucester Bank* v. *Rudry, Merthyr, &c. Coll. Co.*, (1895) 1 Ch. 629, C. A.; *Re Bank of Syria*, (1901) 1 Ch. 115, C. A. See *Davies* v. *Bolton & Co.*, (1894) 3 Ch. 678.

(*c*) *Re Strand Music Hall Co.*, 3 De G. J. & S. 147; *Re General South American Co.*, 2 Ch. D. 337, C. A.; *Prince of Wales, &c. Co.* v. *Athenæum Ass. Soc.*, 1 E. B. & E. 183; *Royal British Bank* v. *Turquand*, 5 E. & B. 428, affirmed 6 E. & B. 327; *Agar* v. *Athenæum Life Ass. Soc.*, 3 C. B. N. S. 725; *Re Tilbury Portland Cement Co.*, 62 L. J. Ch. 814.

(*d*) *Re General Provident, &c. Co.*, 17 W. R. 514.

(*e*) *Re Magdalena, &c. Co.*, John. 690.

(*f*) *Re Wynn Hall Coal Co.*, L. R. 10 Eq. 515.

(*g*) *M'Cormick* v. *Parry*, 7 Exch. 355.

(*h*) *Re General Provident, &c. Soc.*, 17 W. R. 514. See *Exp. National Bank*, L. R. 14 Eq. 507.

(*i*) *South Essex Gaslight Co.*, 2 J. & H. 306; *Re Inns of Court, &c. Co.*, L. R. 6 Eq. 82. *Shears* v. *Jacob*, L. R. 1 C. P. 513; approved, *Deffell* v. *White*, L. R. 2 C. P. 144.

and bonds, the form, validity, and effect of which instruments depend upon and vary according to the powers under which they are issued, and the property, if any, included in each instrument (*k*).

Form of mortgage by company.

A mortgage by a company does not differ, in point of form, from one given by an individual, except that if it is given to secure outstanding or future bills of exchange or promissory notes at maturity the covenant for payment of principal and interest should be omitted, so as to prevent the merger of the simple contract debts in a specialty security for the same debt (*l*).

Power of company to issue debentures.

ii.—**Debentures.**—Generally speaking, a company, having under its memorandum of association express or implied power to borrow on mortgage, may by its articles or by special resolution empower itself to issue debentures to secure moneys advanced for the purposes of the undertaking, and authorize its directors to issue the same (*m*).

Meaning of term "debentures."

Having regard to the provisions of the Companies Act, 1908 (*n*), with respect to the registration of any mortgage or charge for the purpose of securing any issue of debentures or debenture stock, it is important to determine what instruments are denoted by the term "debentures."

No precise legal definition of the expression "debenture" has been given by any statute or reported judicial decision. "It is not either in law or in commerce a strictly technical term, or what is called a term of art" (*o*). The expression occurs in several statutes, and has given rise to decisions as to its meaning for the purposes of the particular Act. Thus, it has been held that an instrument, though not purporting to be a debenture, may be a "debenture" for the purposes of the Bills of Sale Act, 1882, so as not to require registration (*p*); and it would seem that, generally speaking, an instrument

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(*k*) *Bryon* v. *Metropolitan Saloon, &c. Co.*, 3 De G. & J. 123.

(*l*) See Key & Elph., 7th ed. vol. ii. p. 168. See Dav. Conv. vol. ii. pt. ii. p. 608, n. See as to merger, *post*, Chap. LXII., Sect. II.

(*m*) *Bryon* v. *Metropolitan Saloon, &c. Co.*, 3 De G. & J. 123; *Re Inns of Court Hotel Co.*, L. R. 6 Eq. 82; *Re Panama, &c. Co.*, L. R. 5 Ch. 322; *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156.

(*n*) 8 Edw. VII. c. 69, s. 93.

(*o*) Per Chitty, J., in *Levy* v. *Abercorris Co.*, 37 Ch. D. 260, at p. 264. See *British India, &c. Co.* v. *Commissioners of Inland Revenue*, 7 Q. B. D. 165, 172; *Edmonds* v. *Blaina Furnaces*, 36 Ch. D. 215, 219.

(*p*) *Levy* v. *Abercorris Co.*, *sup.*

creating a charge on the property of a company may be treated as a debenture, though not expressly purporting to be such (*q*).

Conversely, it was held that an instrument purporting to be a debenture was chargeable as such with stamp duty, though it was in effect a mere promissory note, which is not ordinarily regarded as a debenture (*r*); and a debenture stock deed was, for stamp purposes, held to be a debenture (*s*).

Debenture need not be under seal.

Debentures are usually given under seal, but this is not essential to their validity, if the articles empower the directors to issue debentures under hand only signed by some of their number (*t*).

Single debenture.

Debentures are usually issued in a series, entitling each holder to rank *pari passu* with other holders forming part of the same series; but a debenture may be a single instrument (*u*).

Meaning of "issue."

Debentures are "issued" when they are delivered, so as to give the holder the right to deal with them (*x*).

Mortgage debentures and simple debentures.

Debentures are of two kinds, namely, mortgage debentures, which are charges of some kind on property, and debentures, which are mere bonds either simply amounting to an acknowledgment of indebtedness, or coupled with an undertaking to pay the principal and interest thereon till payment (*y*).

How charge created.

The charge on property by which a mortgage debenture is secured may be created by a separate covering deed of trust, or by the debenture itself, or partly by a trust deed and partly by debentures.

Trust deeds to secure debentures.

Debenture trust deeds are executed where it is desired that the legal estate in the property charged shall pass to trustees so as to ensure the priority of the security, and so as to enable them to protect the interests of the debenture holders, and in case of default to enter and sell, &c., without any application to the Court. Trust deeds are usually considered advisable in the case of charges upon ships, letters patent, and where debenture holders are to have the option of exchanging debentures to bearer for registered debentures and *vice versâ*. The

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(*q*) See *Enthoven* v. *Hoyle*, 21 L. J. C. P. 100; *Gardner* v. *L. C. & D. Rail. Co.*, L. R. 2 Ch. 201.

(*r*) *British India, &c. Co.* v. *Commissioners of Inland Revenue*, 7 Q. B. D. 165.

(*s*) *City of London Brewery* v. *Commissioners*, (1899) 1 Q. B. at 139.

(*t*) *Ibid.*

(*u*) *Levy* v. *Abercorris Co.*, 37 Ch. D. 260; *Robson* v. *Smith*, (1895) 2 Ch. 118.

(*x*) *Mowatt* v. *Castle Steel, &c. Co.*, 34 Ch. D. 58, 62, C. A. See *Re Bircham*, (1895) 2 Ch. 786, C. A.

(*y*) See per Lindley, J., in *British India, &c. Co.* v. *Commissioners of Inland Revenue*, 7 Q. B. D. 165, at p. 172.

practice of issuing debentures covered by a trust deed is more common than formerly, as it is found that debentures so secured are attractive to investors.

Debentures charged on foreign land.

Trust deeds are also often thought advisable to secure debentures issued by companies carrying on business abroad, and intended to be charged on land in a foreign country. Trusts declared by such deeds will be enforced by the English Courts against the trustees and the company (*z*), according to the well-settled rule that equity, as it acts primarily *in personam,* and not merely *in rem,* may enforce, as between persons residing within the jurisdiction, trusts affecting land situate out of the jurisdiction (*a*). It must, however, be borne in mind that trusts are not recognized by the laws of many foreign countries, and accordingly difficulties may arise and expense be incurred incident to the devolution of the property comprised in the security; and, moreover, if debentures are charged on land in a foreign country otherwise than in accordance with the laws of that country, although the Court here will as far as possible enforce the contract according to English law, and without regard to the law of the foreign country (*b*), yet the omission of formalities required by the law of that country for the validity of the charge may nullify, wholly or in part, the practical effect of the decision of an English Court.

But even without complying with the formalities required by the local law in relation to mortgages, it is still competent for a company to create an effective charge on property belonging to it in a foreign country, for the Court, acting *in personam,* enforces equities in regard to foreign land where the mortgagor company is within the jurisdiction; and in determining whether there is an equity, the Court regards English not foreign law, and if according to English law there is an equity, *e.g.*, if for valuable consideration a company agrees to give a charge on foreign property, the Court will enforce it although the equity may be one not recognised by the *lex loci rei sitæ* (*c*).

(*z*) See *Holroyd* v. *Marshall*, 10 H. L. C. 191.

(*a*) *Penn* v. *Baltimore*, 1 Ves. Sen. 444. See *S. C.*, and notes thereto in Wh. & Tu. L. C. Eq. (7th ed.) vol. i. p. 755. See also *Ewing* v. *Orr-Ewing*, 9 App. Ca. 40; *Mercantile, &c. Co.* v. *River Plate, &c. Co.*, (1892) 2 Ch. 303.

(*b*) *Exp. Pollard*, 4 Deac. 27; *Exp. Holthaussen, Re Scheibler*, L. R. 9 Ch. 722.

(*c*) *British South Africa Co.* v. *De Beers Mines*, (1910) 1 Ch. 354, per Swinfen Eady, J.

Form of trust deed.

A trust deed to secure debentures is usually framed in the form of a conveyance or assignment to trustees for the debenture holders of the property intended to be comprised in the security upon trust to permit the company to carry on its business until default, and thereupon to enter and sell, &c.; and it frequently contains power for the trustees, on default and until sale, to carry on the business for the benefit of the shareholders (*d*).

Powers of sale.

A trust deed to secure debentures may contain a proviso that the trustees shall have the statutory powers of sale and appointing a receiver, &c. in like manner as if they were mortgagees, and such powers will be exerciseable accordingly (*e*).

Power for majority to bind all debenture holders.

Where the payment of debentures is secured by a covering trust deed, a general condition in the deed that a resolution carried by a majority at a meeting shall bind all the debenture holders is valid so as to enable a meeting by the specified majority to assent to any modification consistent with the provisions of the deed. So, where the trust deed provided that a meeting of the debenture holders should have power, by resolution passed by a certain majority, "to sanction any modification or compromise of the rights of the debenture holders against the company or against its property," so as to bind all debenture holders, whether present or not, it was held that a resolution duly passed and carried by the requisite majority sanctioning a loan to the company, and resolving that such loan should take priority over the existing debentures, was a resolution for a "modification" of the rights of the debenture holders within the meaning of the trust deed, and therefore valid and binding on a dissentient minority (*f*). So a resolution to increase the amount of debenture stock and to extend the date for redemption may be a compromise (*g*).

Extent of power of majority.

But the power of a majority to bind the minority of the debenture holders must be clearly expressed, and its limits defined in detail; for the assent of the majority will not be binding except in strict accordance with the terms of the

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(*d*) For forms of trust deeds, see Palmer's Company Precedents.

(*e*) See *Owen & Co.* v. *Cronk*, (1895) 1 Q. B. 265, C. A.

(*f*) *Follit* v. *Eddystone Granite Quarries*, (1892) 3 Ch. 75. See *Sneath* v. *Valley Gold, Ltd.*, (1893) 1 Ch. 477; *Mercantile Investment, &c. Trust Co.* v. *River Plate Trust, &c. Co.*, (1894) 1 Ch. 578; *Finlay* v. *Mexican Investment Corp.*, (1897) 1 Q. B. 517.

(*g*) *Walker* v. *Elmore's Co.*, 85 L. T. 767, C. A.

power (*h*); nor will it bind the minority to anything inconsistent with the provisions of the deed (*i*), or if the objects of the trust have failed (*k*).

Operation of trust deed where no debentures issued.

Where a trust deed is executed to cover debentures intended to be issued, the issue of debentures is an absolute condition precedent to the deed becoming a security. Until they have been issued its only operation is by way of conveyance to the trustees of the legal estate in trust for the company (*l*).

Debentures by covenant with named person.

Formerly debentures were generally framed so as to contain a covenant by the company with the person to whom each debenture was issued to pay to him, his executors, administrators or assigns, the principal and interest thereby secured; but this form was found to cause serious inconvenience. A debenture being a chose in action the right to sue upon the covenant was only assignable in accordance with the rules governing the assignment of choses in action in equity, thereby necessitating an investigation of the assignor's title and other precautions and formalities, which often occasioned considerable trouble and expense.

Release of equities.

The person entitled to such equities may release them, either expressly, or by implication arising from his course of conduct; and, accordingly, where a holder of certain debentures, who held shares in the company which were not fully paid up, transferred his debentures, and the transferees were registered as the proprietors of the debentures, and received certificates to that effect from the company, it was held that the company had, by their conduct, released their lien for unpaid calls against the transferees (*m*). So, the acceptance of notice of an assignment of a bond, given at the office, was held to preclude the company from setting up against the assignee equities between them and the original obligor though the assignment was never registered (*n*).

Modern forms of debentures.

The forms of debentures now commonly used are registered debentures and debentures to bearer.

Registered debentures.

A registered debenture contains a promise by the company to pay the named person to whom it is issued, "or other the regis-

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(*h*) *Mercantile Investment Trust Co.* v. *International Co. of Mexico*, (1893) 1 Ch. 484, C. A.

(*i*) *Hay* v. *Swedish and Norwegian Rail. Co.*, W. N. (1889) 96, C. A.

(*k*) *Collingham* v. *Sloper*, (1893) 2 Ch. 96; this decision was appealed from, but a compromise was sanctioned by C. A. See *S. C.*, (1894) 3 Ch. 716.

(*l*) *Re Bircham*, (1895) 2 Ch. 786, C. A.

(*m*) *Re Northern Assam Tea Co.*, L. R. 10 Eq. 458.

(*n*) *Re Hercules Insurance Co.*, *Brunton's Claim*, L. R. 19 Eq. 302.

tered holder," the principal and interest secured, and also, if such is the intention, a charge upon property of the company intended to be comprised therein.

Advantages of debentures in this form.

The register of holders being evidence of title, this form offers the advantages of enabling the debenture to be dealt with, both as between the original holder and the transferee, and also as between the registered holder for the time being and the company, without the necessity for investigation of title and of rendering the debenture transferable free from equities affecting the original holder.

Registered debentures with coupons.

Registered debentures are sometimes framed so as to render the principal payable only to the registered holder for the time being, but the interest payable to the bearer of coupons attached to the debenture. This is often found convenient and acceptable to trustees and others, who may be unable or unwilling to run the risk of lending money on securities by which the principal is made payable to bearer.

Debentures to bearer.

Debentures are sometimes issued payable to bearer, either simply or so as to be capable of subsequent registration at any time, with the object of making them, as far as possible, freely transferable by delivery as negotiable instruments, without any necessity for a written assignment, and so as to enable the *bonâ fide* holder for value, for the time being, to sue the company in his own name, and to confer upon him a good title free from intervening equities (*o*).

Negotiability of debentures to bearer.

How far debentures to bearer are to be deemed to be negotiable instruments, so as to confer on a person taking them in good faith and for value a good title, though he takes from one who has no title, appears to have given rise to considerable doubt. As regards debentures issued since the Bills of Exchange Act, 1882 (*p*), such instruments, though under seal, may, if so framed as to fall within the definition of a "promissory note" in sect. 83 of that Act, operate as such, and be negotiable accordingly (*q*). But many debentures are so framed as not to fall within that definition, and it is with regard to these that the difficulty arises. The question depends mainly upon whether there is such an established usage to treat debentures to bearer

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(*o*) Bearer debentures are rarely issued, as the *ad valorem* duty is so much greater than the duty on registered debentures.

(*p*) 45 & 46 Vict. c. 61. See sect. 90 (2).

(*q*) *Re Imperial Land Co. of Marseilles*, L. R. 11 Eq. 478.

as negotiable so as to render them, like instruments which are negotiable by the law merchant, an exception to the general rule, that no person can acquire a good title either to a chose in action or any other property from one whose title is defective.

It seems, however, to be now settled that bearer debentures are negotiable, or, at least, that they are so where a mercantile usage to treat them as negotiable can be proved, even though such usage is of recent origin (*r*). It is no longer necessary to tender evidence as to the negotiability of bearer bonds, foreign or English. The existence of the usage has been so often proved that it must now be taken to be part of the law of which the Courts ought to take judicial notice (*s*).

Evidence of custom of Stock Exchange admitted.

In two recent cases (*t*), it has been held that bonds to bearer, issued by foreign companies, were negotiable instruments, upon clear evidence that they were commonly dealt with as such on the Stock Exchange; and in one of these cases it was held that it is not necessary to prove the custom with regard to the securities of the particular company, but that it is sufficient to prove that like bonds issued by similar companies are commonly treated as negotiable securities on the Stock Exchange (*u*).

The question must be decided by English law.

It is to be observed that the question as to the negotiability of instruments must be decided by English law, so that proof that a particular class of instruments issued in a foreign country are negotiable by the law of that country will not make them negotiable instruments in this country (*x*).

Debentures may be made transferable free from equities of company.

Debentures may be so framed as to render them transferable free from equities of the company. This proposition is laid down by Lord Cairns in *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Co.* (*y*). Thus a condition that the principal and interest secured by the debenture will be paid without regard to any equities between the company and any original or intermediate holder thereof, enables a holder to transfer a

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(*r*) *Bechuanaland Exploration Co.* v. *London Trading Bank*, (1898) 2 Q. B. 658; *Edelstein* v. *Schuler*, (1902) 2 K. B. 144; *Goodwin* v. *Robarts*, 1 App. Ca. 476; overruling *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374.

(*s*) *Edelstein* v. *Schuler*, *sup.*

(*t*) *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201; *Venables* v. *Baring Brothers*, (1892) 3 Ch. 527. See also *Bentinck* v. *London Joint Stock Bank*, (1893) 2 Ch. 120; *Stern* v. *Reg.*, (1896) 1 Q. B. 211.

(*u*) Per Kekewich, J., in *Venables* v. *Baring Brothers*, *sup.*, at p. 540.

(*x*) *Picker* v. *London and County Banking Co.*, 18 Q. B. D. 515, C. A.; *Colonial Bank* v. *Cady and Williams*, 15 App. Ca. 267.

(*y*) L. R. 2 Ch. 391, at p. 397. See also per Rolt, L. J., in *Re Blakely Ordnance Co.*, L. R. 3 Ch. at p. 159.

debenture to a transferee for value and in good faith free from any equities as between him and the company notwithstanding the voluntary winding up of the company and after judgment in a debenture holder's action (*z*).

But such a condition is only a protection to the transferee when he has been placed upon the register (*a*).

Estoppel.

This exception to the general rule that an assignment is subject to equities appears to be founded on the doctrine of estoppel. Where a company issues a debenture framed in such a manner as to amount to a representation that, in return for valuable consideration received, it will perform certain conditions, expressed in or to be implied from the debenture, the company is by this doctrine precluded from repudiating the conditions while retaining the benefit, but will be bound to perform them as between itself and any person acting on the faith of those conditions (*b*).

Contracts by "advertisement."

Moreover, it has been held that a company, like an individual, may be bound by an offer addressed to any person who will perform certain acts deemed to be for its benefit, and may by the terms of the offer make the performance of the acts a sufficient acceptance without notification (*c*).

Transfer free from equities.

Where debentures are made payable to bearer it would seem that the nature of the contract will generally be taken to indicate an intention that they shall be transferable free from the equities affecting them (*d*). But the case may be otherwise if the debentures are framed so that the contract is in the alternative with a named person or to bearer (*e*).

Transfer without writing.

It is well settled that debentures issued to bearer may stipulate that the company will recognize the bearer as owner, without requiring him to prove his title by producing any written assignment (*f*).

(*z*) *Re Goy & Co.*, (1900) 2 Ch. 149; cf. *Re Brown and Gregory*, (1904) 1 Ch. 627; *Re Rhodesia Goldfields*, (1910) 1 Ch. 239.

(*a*) *Re Palmer's Co.*, (1904) 2 Ch. 743.

(*b*) *Re Bahia and San Francisco Rail. Co.*, L. R. 3 Q. B. 584; *Webb* v. *Herne Bay Commissioners*, L. R. 5 Q. B. 642; *Re Agra and Masterman's Bank*, L. R. 2 Ch. 391; *Carr* v. *L. & N. W. Rail. Co.*, L. R. 10 C. P. 307; *Goodwin* v. *Robarts*, 1 App. Ca. 476; *Balkis Co.* v. *Tomkinson*, (1893) A. C. 396.

(*c*) *Williams* v. *Carwardine*, 4 B. & Ad. 621; *Carlill* v. *Carbolic, &c. Co.*, (1893) 1 Q. B. 256. See also *Re Agra and Masterman's Bank*, L. R. 2 Ch. 391.

(*d*) *Re Blakely Ordnance Co.*, L. R. 3 Ch. 154; *Re Natal Investment Co.*, L. R. 3 Ch. 355, 361.

(*e*) See *Re Natal Investment Co.*, *sup.*; *Re Imperial Land Co. of Marseilles*, *Exp. Colborne*, L. R. 11 Eq. 487. But see *Re Blakely Ordnance Co.*, *sup.*

(*f*) *Re Blakely Ordnance Co.*, *sup.*, at p. 159; *Re Natal Investment Co.*, L. R.

Discharge to company by delivery.

The delivery of the debentures or of interest coupons may be made a good discharge to the company for moneys paid thereon, if such is the nature of the contract between the parties (*g*).

Bearer may sue in his own name.

A debenture to bearer will entitle the holder for the time being, as equitable assignee of the contract, to the full benefit thereof, so as to enable him to sue thereon in his own name (*h*).

Remedy where debentures are secured by a trust deed, is through the trustees.

Where a trust deed to secure certain debentures to bearer issued by a company contained a covenant with the trustees to pay to them the interest, and to provide by a sinking fund for the gradual discharge of the debentures, and each debenture contained a covenant with the trustees to pay 100*l.* to the bearer thereof, and interest to the bearer of the coupons annexed thereto, it was held that neither the bearer of a debenture, as to principal, nor the bearer of a coupon, as to interest, was a creditor of the company, either at law or in equity, so as to be entitled to present a winding-up petition, but that his only right of action was through the trustees (*i*).

Distinction where the debentures create direct contract with holders.

Where, however, debentures were secured by a trust deed containing a similar covenant with the trustees, but each debenture contained a general undertaking to pay the principal and interest subject to indorsed conditions, one of which was that the bearer of the debenture and bearer of each of the coupons should be entitled to the principal and interest respectively: it was held that there was a direct debt from the company, so that the holder of a debenture might present a petition to wind up the company (*k*).

Debentures in blank.

Debentures are sometimes issued with a blank left for the name of the holder, so as to render them transferable by delivery by way of assignment or deposit as security with a view of enabling the holder for the time being to insert the name of himself or a nominee, and to register the person whose name is filled in as owner of the debenture.

Where a company issued debentures purporting to charge property as security for a loan, and delivered them to the

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3 Ch. 355, at p. 360. See *Higgs* v. *Northern Assam Tea Co.*, L. R. 4 Ex. 387, 394.

(*g*) *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 385; *Re Natal Investment Co.*, L. R. 3 Ch. 355.

(*h*) *Re Blakely Ordnance Co.*, L. R. 3 Ch. 154.

(*i*) *Re Uruguay Central Rail. Co.*, 11 Ch. D. 372. See *Re Empress Engineering Co.*, 16 Ch. D. 125, C. A.; *Gandy* v. *Gandy*, 30 Ch. D. 57, C. A.

(*k*) *Re Olathe Silver Mining Co.*, 27 Ch. D. 278.

lenders with blanks left for the obligee, it was held that the holders had in equity a good charge as against the company, notwithstanding that the debentures were void at law (*l*); and where some of a series of debentures were issued in blank and deposited with a bank as security for a loan, it was held that the debentures were void, but that the lender had an equitable security for the loan, and was entitled to rank *pari passu* with the other valid debenture holders (*m*).

Option to take debentures.

So an option to call at any time for a specific amount of mortgage debentures of a given issue in satisfaction of a debt is a good equitable security, while the issue remains unexhausted, and may be exercised after judgment in a debenture holder's action (*n*).

Terminable and perpetual debentures.

Debentures may be either terminable or perpetual. Terminable debentures may be made payable at a stated time or by drawings at stated periods. A provision in a debenture accelerating the time for payment if default should be made in payment of interest is not a penalty against which equity can relieve. Independently of any such provision, the holder of a debenture which has not matured may, on the winding up of the company, at once enforce his security for the full amount of his principal, interest, and costs (*o*).

The intention that a debenture shall be perpetual, that is to say, payable only on default in payment of interest or on the winding up of the company, must be clearly expressed. If merely no date is fixed for payment of the principal, the debenture holder will be entitled to enforce his security upon non-payment by the company after six months' notice at any time (*p*).

Debentures may be made irredeemable, or redeemable only on the happening of a contingency however remote, or on the expiration of a period however long, any rule of equity to the contrary notwithstanding (*q*).

Interest on debentures.

Interest continues to run on a debenture after it falls due, although not expressly provided for (*r*); but it is a question

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(*l*) *Re Strand Music Hall Co.*, 1 De G. J. & S. 147.

(*m*) *Re Queensland Land and Coal Co.*, (1894) 3 Ch. 181.

(*n*) *Pegge* v. *Neath Tramways Co.*, (1898) 1 Ch. 183.

(*o*) *Hodson* v. *Tea Co.*, 14 Ch. D. 859; *Wallace* v. *Universal Automatic Machines Co.*, (1894) 2 Ch. 547, C. A.

(*p*) *Hopkins* v. *Worcester, &c. Canal Proprietary*, L. R. 6 Eq. 437. See *Exp. Delhasse*, 7 Ch. D. 511, C. A.

(*q*) 8 Edw. VII. c. 69, s. 103.

(*r*) *Price* v. *G. Western Ry.*, 16 M. & W. 244; *Morgan* v. *Jones*, 8 Exch. 620; *Gordillo* v. *Weguelin*, 5 Ch. D. 303.

of discretion. The rule against payment of dividends on shares before any profits are realized does not apply so as to render improper the payment of interest on debentures (*s*).

The right to recover interest on debenture stock issued under Part III. of the Companies Act, 1863, is not barred for twenty years (*t*).

Coupons.

There seems no practical objection to annexing coupons for the interest of debentures (*u*). And these coupons being mere tokens, require no stamp (*x*).

Power to borrow on debenture stock generally.

iii.—**Debenture Stock.**—Where companies have the power to raise money by mortgage or bond they may do so by debenture stock (*y*); and to the extent of the stock so issued the borrowing powers are to be extinguished (*z*). Such stock is a charge on the undertaking, and is transferable and transmissible (*a*). No rate of interest is now prescribed (*b*).

The issue of debenture stock by way of security is not *ultra vires* of a company governed by the Companies Clauses Act, 1863, s. 22 (*c*), and may be made by a company governed by the Companies Acts (*d*).

Nature of debenture stock.

Debenture stock principally differs from a debenture in that, subject to any restriction imposed by the stock conditions, any fraction of the stock may be transferred (*e*).

Debenture stock is usually secured by a trust deed which specifically mortgages the property of the company and creates a floating charge. The deed is stamped with *ad valorem* duty unless under the Finance Act, 1899, the duty has been paid upon the statement which has to be delivered to the Inland Revenue Commissioners in the case of any company issuing a loan, and the stock certificates do not require stamping (*f*).

(*s*) *Bloxam* v. *Metropolitan Rail. Co.*, L. R. 3 Ch. 337.

(*t*) *Re Cornwall Minerals Ry.*, (1897) 2 Ch. 74.

(*u*) Dav. Conv. (4th ed.) vol. ii. pt. 2, p. 683; and *Bowen* v. *Brecon Rail. Co.*, L. R. 3 Eq. 541.

(*x*) *Enthoven* v. *Hoyle*, 13 C. B. 373. Coupons on debentures payable abroad are liable to income tax. See *Alexandria Water Co.* v. *Musgrave*, 11 Q. B. D. 174, C. A.

(*y*) Comp. Cl. Act, 1863 (26 & 27 Vict. c. 118), s. 22; and 32 & 33 Vict. c. 48, s. 3.

(*z*) 26 & 27 Vict. c. 118, s. 22.

(*a*) *Ibid.* s. 23.

(*b*) 32 & 33 Vict. c. 48, s. 1, repealing part of 26 & 27 Vict. c. 118, s. 22.

(*c*) *Whitehaven Joint Stock Bank* v. *Reed*, 54 L. T. 360.

(*d*) *Robinson* v. *Montgomeryshire Brewery*, (1896) 2 Ch. 841.

(*e*) Hamilton, Comp. Law, 278.

(*f*) *Ibid.* 283.

Debenture stock gives the holder no right to the possession of the property of the company (*g*).

A limited company can now issue irredeemable debenture stock (*h*).

Power of railway companies to issue debenture stock.

Similar powers as to debenture stock are given to railway companies (*i*), and this even though the special Act does not expressly incorporate Part III. of the Companies Clauses Act, 1863 (*k*). In order to check the issue of debentures beyond the powers of the railway company, a declaration must be indorsed upon each mortgage bond or certificate of debenture stock specifying the powers under which the securities are issued (*l*), but with a proviso that nothing in the Act is to affect the liability of the company to third persons (*m*). Debenture stock of a railway company does not give to the holders any charge which they did not possess before the Act over the proceeds of sale of surplus lands (*n*).

Bonds of companies.

iv.—Bonds.—A bond, unless by its terms specifically made so, is no charge on the property of a company (*o*); but bonds charging "all the estate, property, and effects" of the company, expressed to be made under a power in the articles of association authorizing the borrowing of money on the property of the company by debentures, were held to create a valid charge on the property (*p*).

It is not clear whether the charge would have been upheld if the bonds had not expressly referred to the power (*q*).

Lloyds' bonds.

Lloyds' bonds are instruments under seal, amounting to an account stated, and containing a promise to pay, but not creating any charge on the property of a company. If given for money lent, they are invalid (*r*). But if given for money due to a contractor, or the like, and generally, they will be

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(*g*) *Attree* v. *Hawe*, 9 Ch. D. 337, at p. 349.

(*h*) 8 Edw. VII. c. 69, ss. 103, 285.

(*i*) 30 & 31 Vict. c. 127, ss. 24, 25.

(*k*) *Re Mersey Rail. Co.* (No. 1), (1895) 2 Ch. 287, C. A.

(*l*) 29 & 30 Vict. c. 108, s. 14.

(*m*) *Ibid.* s. 18.

(*n*) *Re Hull, &c. Rail. and Dock Co.*, 40 Ch. D. 119, C. A.

(*o*) *Russell* v. *E. Anglian Rail. Co.*, 3 Mac. & G. 104, 125; *Imperial Mercantile, &c. Assoc.* v. *Newry, &c. Rail. Co.*, Ir. R. 2 Eq. 524; *Norton* v. *Florence, &c. Co.*, 7 Ch. D. 332.

(*p*) *Re Florence Land, &c. Co.*, 10 Ch. D. 530, C. A. at p. 536.

(*q*) *Re Florence Land, &c. Co.*, *sup.*

(*r*) *Chambers* v. *Manchester, &c. Co.*, 5 B. & S. 588; *Fountaine* v. *Carmarthen Rail. Co.*, L. R. 5 Eq. 316.

enforced, so far as the company has had the benefit of the money (*s*).

Agreement to issue debentures.

v.—Contracts to issue and take Debentures, &c.—A definite contract by a company to issue debentures or debenture stock charged on property of the company gives to the persons entitled to the benefit of the contract as good a claim and as effectual a security in equity as if the debentures or debenture stock had been actually issued pursuant to the agreement (*t*); and an execution creditor is only entitled to goods seized subject to a charge in favour of the intended debenture holders (*u*).

Specific performance.

Specific performance of an agreement to give a charge on specified property may be enforced against a company, as against an individual, if the money has been actually advanced, but not otherwise (*x*). And an option to call for a specific amount of debentures of a given issue in satisfaction of a debt is a good equitable security, so long as the issue remains unexhausted (*y*).

Conversely, specific performance would not be enforced against a person who had agreed to take debentures as security for an advance to be made by instalments, so as to compel him to pay up his instalments pursuant to the agreement; the remedy of the company in such a case was by damages (*z*). The measure of the damages was the loss sustained by the breach of contract, not by the amount agreed to be advanced (*a*). But now by the Companies Act, 1908, s. 105, a contract to take debentures may be enforced by specific performance (*b*).

Payment of instalments of loan.

A subscriber is in no way bound to continue the payment of his instalments after a company goes into liquidation (*c*), or if he has notice that the company is insolvent (*d*), or apparently that the particular object for which the money is intended to be advanced has become impracticable (*e*).

(*s*) *White* v. *Carmarthen, &c. Ry.*, 1 H. & M. 786; *Re Cork and Youghal Rail. Co.*, L. R. 4 Ch. 748; *Dickson* v. *Swansea Vale, &c. Rail. Co.*, L. R. 4 Q. B. 44; *Blackburn, &c. Soc.* v. *Cunliffe*, 22 Ch. D. 61, C. A.; affirmed 9 App. Ca. 857. See *Wrexham Mold Ry.*, *ante*, p. 482.

(*t*) *Re Queensland Land and Coal Co.*, (1894) 3 Ch. 181. See *Mercantile Investment Co.* v. *River Plate Trust*, (1892) 2 Ch. 303.

(*u*) *Simultaneous Printing Syn.* v. *Foweraker*, (1901) 1 K. B. 771.

(*x*) *Ante*, p. 59.

(*y*) *Pegge* v. *Neath Tramways*, (1898) 1 Ch. 183.

(*z*) *Western Wagon Co.* v. *West*, (1892) 1 Ch. 271.

(*a*) *South African Territories* v. *Wallington*, (1898) A. C. 309.

(*b*) 8 Edw. VII. c. 69, s. 105.

(*c*) *Re Ellerby*, 20 W. R. 855.

(*d*) *Exp. Chalmers*, L. R. 8 Ch. 289; *Re Phœnix Bessemer Steel Co.*, *Exp. Carnforth Co.*, 4 Ch. D. 108, C. A.

(*e*) See *Wilson* v. *Church*, 13 Ch. D. 1, C. A.; *National Bolivian Navig. Co.*

SECTION III.

WHAT SUBJECT-MATTER MAY BE INCLUDED IN SECURITIES GIVEN BY COMPANIES.

Distinction between companies for public purposes and ordinary companies.

i.—Undertaking, Tolls, Surplus Lands, &c. of Railway and Public Companies.—With regard to the subject-matter which may be included in securities given by companies, a distinction is to be drawn between companies having, to a greater or less degree, a monopoly in providing public traffic, or carrying out other objects in which the community is interested, and companies formed for purposes of private adventure and profit (*f*).

Railway cannot mortgage permanent way.

On grounds of public policy, the permanent way of a railway company cannot be mortgaged, or sold, or dealt with in any way (*g*).

Meaning of "undertaking" of railway, &c. companies.

The question as to what is included in mortgages of the "undertaking" of railway and other companies has frequently come before the Courts for decision. In the Lands Clauses Act, 1845, s. 2 (*h*), the "undertaking" means "the undertaking or works, of whatever nature, which should by the special Act be authorized to be executed"; in the Railway Clauses Consolidated Act, s. 2 (*i*), it signifies, "the railway and works."

Mortgage of undertaking of railway company.

A mortgage of the "undertaking" of a railway company passes the rails, stations, and other buildings and works (*k*); but does not include the soil of the railway (*l*), or surplus lands, or the proceeds of sale thereof (*m*), or the rolling and other stock or property of the company as carriers (*n*).

Mortgage of surplus lands.

But a specific charge may be made of surplus lands (*o*), even where the power to mortgage is limited to mortgages of the

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v. *Wilson*, 5 App. Ca. 176; *Collingham* v. *Sloper*, (1893) 2 Ch. 96, reversed on other grounds, (1894) 3 Ch. 716, C. A.

(*f*) As to the obligations and restrictions on railway companies having reference to the interests of the public, see *Great Northern Rail. Co.* v. *Eastern Counties Rail. Co.*, 9 Ha. 306, 310.

(*g*) *Re Panama, &c. Royal Mail Co.*, L. R. 5 Ch. 318, 321; *Gardner* v. *London, Chatham and Dover Rail. Co.*, L. R. 2 Ch. 201; *Re Bagnalstown Rail. Co.*, Ir. R. 1 Eq. 275.

(*h*) 8 & 9 Vict. c. 18.

(*i*) *Ibid.* c. 20.

(*k*) *Legg* v. *Mathieson*, 2 Giff. 71. See *Wickham* v. *New Brunswick Rail. Co.*, L. R. 1 P. C. 64.

(*l*) *Doe* d. *Myatt* v. *St. Helen's Rail. Co.*, 2 Q. B. 364.

(*m*) *Gardner* v. *London, Chatham and Dover Rail. Co.*, L. R. 2 Ch. 201.

(*n*) *Hart* v. *East Union Rail. Co.*, 8 Exch. 116.

(*o*) *Gardner* v. *London, Chatham and Dover Rail. Co.*, *sup.* And see 8 & 9 Vict. c. 16, Sched., Form (C.).

undertaking, if the mortgage is given to secure an antecedent debt and the transaction is not a cloak for unauthorized borrowing (*p*). It can, however, be made only subject to the right of pre-emption in the adjacent owners (*q*).

Undertaking, rates, tolls, &c.

The word "undertaking," in the case of a railway company or other company of a public nature, means the undertaking as a going concern, and, accordingly, the mortgagee cannot interfere with the management of the undertaking (*r*); and the holder of mortgage debentures secured on the undertaking is not entitled to foreclosure or sale (*s*).

When, under the powers of their Act, a railway company mortgages "the undertaking, and the rates, tolls, and all other sums arising by virtue of the Act," no interest in the land passes on which an ejectment can be maintained (*t*).

And in a similar case of a mortgage by a canal company of their "undertaking, rates, and duties," until the principal sum should be paid by them with interest, Tindal, C. J., held that the terms of the contract were satisfied by giving the lenders a security on the undertaking, without allowing them to sue the corporation (*u*).

The expression "tolls and other sums of money" means sums *ejusdem generis* as tolls (*x*).

Mortgages by companies of tolls, &c.

Companies incorporated by special Acts for purposes of a public nature are often empowered by their Acts to levy tolls on persons using their docks, canals, piers, bridges, or other undertaking, and to raise money for the purposes of their undertakings by mortgage of the tolls. The nature and form of such securities depends upon the provisions of the particular Act.

The following points, decided under the Turnpike Acts (*y*),

(*p*) *Stagg* v. *Medway Navigation Co.*, (1903) 1 Ch. 169, C. A. See *Reeve* v. *Medway, &c.*, (1905) W. N. 75.

(*q*) *De Winton* v. *Mayor of Brecon*, 26 Beav. 533.

(*r*) *Gardner* v. *London, Chatham and Dover Rail. Co.*, L. R. 2 Ch. 201.

(*s*) *Furness* v. *Caterham Rail. Co.*, 25 Beav. 614; *S. C.*, 27 Beav. 358; *Re Herne Bay Waterworks Co.*, 10 Ch. D. 42; *Blaker* v. *Herts and Essex Waterworks Co.*, 40 Ch. D. 399.

(*t*) *Doe* v. *St. Helen's Rail. Co.*, 2 Q. B. 364. See *Wickham* v. *New Brunswick, &c. Rail. Co.*, L. R. 1 P. C. 64, 78; *Re Bagnalstown Rail. Co., Exp. Smith*, Ir. R. 1 Eq. 275; *Fairtitle* v. *Gilbert*, 2 T. R. 169. See *Doe* v. *Booth*, 2 B. & P. 219; and *Perkins* v. *Deptford Pier Co.*, 13 Sim. 277.

(*u*) *Pontet* v. *Basingstoke Canal Co.*, 3 Bing. N. C. 433.

(*x*) *Gardner* v. *London, Chatham and Dover Rail. Co.*, L. R. 2 Ch. 201.

(*y*) 3 Geo. IV. c. 126; 4 Geo. IV. c. 95; 7 & 8 Geo. IV. c. 24; 9 Geo. IV. c. 77; 3 & 4 Will. IV. c. 80; 4 & 5 Vict. c. 59; 12 & 13 Vict. cc. 46, 87. Turnpike trusts have now been abolished, and no further reference to these Acts appears to be here required.

may be here noticed, as the rules therein laid down appear to be applicable to the class of securities now under consideration.

Ejectment by mortgagee.

A mortgagee of tolls, toll-houses, and gates can maintain ejectment (*z*); but a mortgagee of the rates and tolls only cannot (*a*).

Mortgagee in possession.

If any mortgagee of the tolls takes possession, he receives the tolls, subject to an account with the other mortgagees for such portion of the tolls as they are entitled to in respect of their advances (*b*).

A mortgagee of tolls has no equity to prevent mortgagees of the land, out of which the tolls issue, entering into the land under their mortgage and judgment (*c*).

Any one of several mortgagees of tolls, toll-houses, &c., may maintain ejectment notwithstanding a clause in the Act that all mortgagees shall be creditors in equal degree (*d*).

Parties to action.

One of several mortgagees of tolls cannot bring an action to recover his arrears of interest without making the other mortgagees parties (*e*).

Ultra vires mortgage of toll-houses, &c.

A power to mortgage tolls does not authorize a mortgage of toll-houses and land; and, if a mortgage is given including such property, and ejectment is brought by the mortgagee, the mortgagors are not estopped by the deed from insisting that the mortgage was *ultra vires* (*f*).

A mortgagee of the rates and tolls of a company will not be allowed an injunction to prevent a subsequent judgment creditor taking possession of the lands, though the consequence might be to prevent the mortgagee from taking the tolls (*g*).

Mortgage of rolling stock.

A mortgage of the rolling stock of a railway has been held valid (*h*); but this was before the Act (*i*) protecting rolling stock from execution, and it seems that the Court would now, upon the intervention of shareholders, or of the Crown, prevent the railway from being deprived of the means of working the line (*k*).

(*z*) *Doe* v. *Lediard*, 4 B. & Ad. 137.

(*a*) *Doe* v. *The St. Helen's and Runcorn Gap Rail. Co.*, 2 Q. B. 364. See *Doe* v. *Horne*, 3 Q. B. 757; and *Perkins* v. *Deptford Pier Co.*, 13 Sim. 277. But see *Doe* v. *Rous*, 17 Jur. 502, Q. B.; *Cobbett* v. *Wheeler*, 9 W. R. 140, Q. B.

(*b*) *Doe* v. *Lediard*, *sup.*

(*c*) *Perkins* v. *Prichard*, 7 Jur. 29.

(*d*) *Doe* d. *Banks* v. *Booth*, 2 B. & P. 219. See *Doe* v. *Penfold*, 3 Q. B. 757; as to priority, *Jortin* v. *South Eastern Rail. Co.*, 6 H. L. C. 425.

(*e*) *Mellish* v. *Brookes*, 3 Beav. 22.

(*f*) *Fairtitle* v. *Gilbert*, 2 T. R. 169. See *Doe* v. *Horne*, 3 Q. B. 757.

(*g*) *Perkins* v. *Deptford Pier Co.*, 13 Sim. 277.

(*h*) *Blackmore* v. *Yates*, L. R. 2 Ex. 225.

(*i*) 30 & 31 Vict. c. 127.

(*k*) L. R. 2 Ex. at p. 227. See

Mortgage of undertaking or property of a joint stock company.

ii.—Undertaking and Property of Company—Floating Security.—Generally speaking, a mortgage or a debenture charging the "undertaking" of a joint stock company includes all the property of the company in existence at the date of the creation of the charge (*l*); but subsequently acquired property may be expressly included in the charge by the addition of such words as all "property present and future" (*m*), or "all moneys arising" from "the undertaking" (*n*); and the intention to include such property may be inferred from the nature of the business of the company, and from the terms of articles creating the power to borrow (*o*). Future book debts may be charged and have been held to be included in a mortgage of the "property" of a company (*p*).

Floating security.

The effect of a mortgage or debenture charging the "undertaking and property" (*q*) or the "estate property and effects" (*r*) of a company, will apparently, as a general rule, be construed as indicating an intention to create a floating security on all property of the company as a going concern, so as to leave the company free to dispose of its property, by sale or otherwise, in the ordinary course of its business under the management of its directors (*s*). So a company was held to be entitled to apply moneys received from a fire insurance company, while the company was still a going concern, in payment of simple contract debts incurred in the course of its business, and that the payment could not be disturbed by the debenture holders on the ground of fraudulent preference (*t*). So a company, in the ordinary course of business, may, notwithstanding a floating charge, mortgage (*u*) or sell a part, or even the whole, of its

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Blaker v. *Herts and Essex Waterworks Co.*, 40 Ch. D. 399.

(*l*) *Re New Clydach, &c. Iron Co.*, L. R. 6 Eq. 514. See *Re Colonial Trusts Corporation, Exp. Bradshaw*, 15 Ch. D. 465 (charge on real and personal estate of the company).

(*m*) *Re Horne and Hellard*, 29 Ch. D. 736; *Edwards* v. *Standard Rolling Stock Syndicate*, (1893) 1 Ch. 574.

(*n*) *Re Panama, &c. Royal Mail, &c. Co.*, L. R. 5 Ch. 318.

(*o*) *Re Florence Land, &c. Co.*, 10 Ch. D. 530, C. A.

(*p*) *Bloomer* v. *Union Coal and Iron Co.*, L. R. 16 Eq. 383.

(*q*) *Re Marine Mansions Co.*, L. R. 4 Eq. 601. See *Re Panama, &c. Royal Mail Co.*, L. R. 5 Ch. 318.

(*r*) *Re Florence Land, &c. Co.*, *sup.*; *Hodson Tea Co.*, 14 Ch. D. 859.

(*s*) *Re Florence Land, &c. Co.*, 10 Ch. D. 530, C. A.; *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681; *Re Hamilton's Windsor Ironworks Co., Exp. Pitman*, 12 Ch. D. 707; *Government Stock, &c. Investment Co.* v. *Manila Rail. Co.*, (1897) A. C. 81.

(*t*) *Willmott* v. *London Celluloid Co.*, 34 Ch. D. 147, C. A. See also *English and Scottish Mercantile Investment Trust* v. *Brunton*, (1892) 2 Q. B. 700, C. A. See further as to fraudulent preference as regards debentures, *post*, Chap. XXXI., Sect. II. (iv.).

(*u*) *Wheatley* v. *Silkstone Coal Co.*, 29 Ch. D. 715; *Re Hubbard & Co.*, *inf.*

property, if not *ultra vires* (*x*), and may issue debentures (*y*). But a seizure of the company's goods by the sheriff is not a dealing in the ordinary course of business (*z*), nor is the working out of a foreclosure decree in the absence of the debenture holders (*a*).

A floating charge on the undertaking or property of a company must be registered under the Companies Act, 1908 (*b*).

The holder of a charge comprising by way of floating security the general assets of a company, so long as the company is a going concern, cannot, by notice to a debtor to the company, require the particular debt to be paid to him in satisfaction of his charge (*c*).

A floating charge does not specifically affect any particular assets until the security crystallizes; and there is no equity in the holder arising from his merely giving notice to seize a particular asset (*d*), he cannot obtain priority by being the first to give notice to the debtor (*e*).

When a floating security becomes specific.

But a floating security, though merely general in its inception, will become specific upon the appointment of a receiver (*f*), or upon the winding up of the company (*g*), upon the happening of either of which events, the charge created by the debentures or trust deed will attach to all the property belonging to the company at that time, so as to give the debenture holders a specific charge on that property in priority to all subsequent incumbrancers, creditors, or purchasers (*h*).

But a floating charge created within three months of the presentation of the petition for winding up will, unless the company was solvent immediately after the creation of the charge,

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(*x*) *Re Vivian & Co.*, (1900) 2 Ch. 654; *Re Borax Co.*, (1901) 1 Ch. 326, C. A.

(*y*) *Re Hubbard & Co.*, 68 L. J. Ch. 54.

(*z*) *Davey* v. *Williamson*, (1898) 2 Q. B. 194; cf. *Re Roundwood Colliery Co.*, (1897) 1 Ch. 373.

(*a*) *Wallace* v. *Evershed*, (1899) 1 Ch. 891.

(*b*) 8 Edw. VII. c. 69, *post*, p. 511.

(*c*) *Robson* v. *Smith*, (1895) 2 Ch. 118.

(*d*) *Evans* v. *Rival Granite Quarries*, (1910) 2 K. B. 979.

(*e*) *Re Ind, Coope & Co.*, (1911) 2 Ch. 223.

(*f*) *Brunton* v. *Electrical Engineering Co.*, (1892) 1 Ch. 434; *Re Roundwood Colliery Co.*, (1897) 1 Ch. 373, 393; *Re Hubbard & Co.*, 68 L. J. Ch. 54.

(*g*) *Re Marine Mansions Co.*, L. R. 4 Eq. 601; *Re Panama, &c. Royal Mail Co.*, L. R. 5 Ch. 318; *Hodson* v. *Tea Co.*, 14 Ch. D. 859; *Re Roundwood Colliery Co.*, *sup.* The commencement of the winding up of a company by the Court dates from the presentation of the petition, C. A. (1908), s. 139. As to a voluntary winding up, see *Re West Cumberland Steel Co.*, 40 Ch. D. 361.

(*h*) See as to priorities of securities of companies, *post*, Chap. LVII.

be invalid except as to the consideration for the charge together with interest (*i*).

But a floating security, created by debentures, will not be rendered specific by mere default on the part of the company in payment of principal or interest or other default under the debentures, or the covering trust deed, in the absence of express stipulation, until the debenture holders take some steps to enforce their security, and to prevent the company from continuing to carry on its business (*k*).

A person who purchased land from a company which had issued debentures expressed to operate as a floating security until default in payment of principal and interest, was held to be entitled to reasonable evidence that there had been no default in payment of principal or interest of the debentures (*l*).

Effect of winding up.

Upon the liquidation of the company a floating security ceases to float (*m*); and where debentures by way of floating security fix a time for payment of the principal moneys secured, the winding up of the company before that time renders the money immediately payable, and entitles the debenture holders at once to realize their security for the full amount of principal, interest, and costs (*n*).

Company may deal with its property after issuing debentures by way of floating security.

Inasmuch as debentures which are given by way of floating security do not become specific until the appointment of a receiver, or on the company being wound up, it may in the meantime so long as the company is a going concern, notwithstanding the debentures, deal with its property in the ordinary course of its business (*o*). Accordingly, a company may, after issuing such debentures, give a mortgage of a specific asset to secure an advance necessary for carrying on its business, which will rank in priority over the debentures (*p*), even though the debentures are expressed to be a first charge on the undertaking and present and future property of the company (*q*).

So where a company purchased land and deposited the deeds

(*i*) 8 Edw. VII. c. 69, s. 212; *Re Columbian Co.*, (1910) 2 Ch. 120.

(*k*) *Government Stock Investment, &c. Co.* v. *Manila Rail. Co.*, (1897) A. C. 81.

(*l*) *Re Horne and Hellard*, 29 Ch. D. 736.

(*m*) *Re Panama Mail Co.*, 5 Ch. 318.

(*n*) *Wallace* v. *Universal Automatic Co.*, (1894) 2 Ch. 547, C. A.

(*o*) *Supra*, p. 503.

(*p*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681, C. A.; *Re Hamilton's Windsor Ironworks Co., Exp. Pitman*, 12 Ch. D. 707; *Ward* v. *Royal Exchange Shipping Co.*, 58 L. T. 174; *Re Ind, Coope & Co.*, (1911) 2 Ch. 223.

(*q*) *Wheatley* v. *Silkstone Coal Co.*, 29 Ch. D. 715. As to constructive notice that such debentures are thereby expressed to be a first charge, see *English and Scottish Mercantile Investment Trust* v. *Brunton*, (1892) 2 Q. B. 700, C. A.

with the person who advanced the purchase money, the equitable mortgagee had priority over the debenture holders (*r*).

In some cases the debenture itself expressly prohibits the company from creating charges on its property in priority to the debentures. But such a provision does not prevent a person without notice from acquiring a charge upon specific property in priority to the debentures (*s*), nor a solicitor of the company from acquiring a lien having priority over the floating charge (*t*).

So also a distress levied before a floating security has become specific will prevail over the holders of the debentures (*u*).

Debentures, which are originally, or which have become charges upon the specific property of the company, are prior to all subsequent incumbrances, judgments, and general creditors, so far as relates to the property specifically charged by the debentures (*x*). And this is so where the debentures are only agreed to be issued and not actually issued (*y*), and also where debentures are issued without authority if the holders had no notice of the irregularity (*z*).

As between execution creditor of the company and debenture holders by way of floating charge the former takes subject to the equity of the latter, and the rights of the debenture holder prevail (*a*), at any rate until the sheriff has sold (*b*), and also notwithstanding sale if before sale a receiver has been appointed (*c*).

Charge of land of company.

Where debentures are charged on the property of a company including land, though by way of floating security, a contract for sale of such debentures is a contract for an interest in land within sect. 4 of the Statute of Frauds (*d*).

Charge of chattels.

A debenture which comprised the chattels of the company must have been registered under the former Bills of Sale

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(*r*) *Re Connolly Bros.*, (1912) 2 Ch. 25.

(*s*) *Re Castell and Brown*, (1898) 1 Ch. 315; *Re Valletort Sanitary Laundry Co.*, (1903) 2 Ch. 654; *Wilson* v. *Kelland*, (1910) 2 Ch. 360.

(*t*) *Brunton* v. *Electrical Engineering Corp.*, (1892) 1 Ch. 434.

(*u*) *Re Roundwood Coll. Co., Lee* v. *Roundwood Coll. Co.*, (1897) 1 Ch. 373, C. A.

(*x*) *Ames* v. *Birkenhead Docks Trustees*, 20 Beav. 332; *Furness* v. *Caterham, &c. Co.*, 27 Beav. 358; *Re Marine Mansions Co.*, L. R. 4 Eq. 601.

(*y*) *Simultaneous Colour Printing Syn.* v. *Foweraker*, (1901) 1 K. B. 771.

(*z*) *Duck* v. *Tower Galvanizing Co.*, (1901) 2 K. B. 314.

(*a*) *Davey* v. *Williamson*, (1898) 2 Q. B. 194.

(*b*) *Re Standard Manufacturing Co.*, (1891) 1 Ch. 627; *Re Opera, Lim.*, (1891) 3 Ch. 260, C. A.

(*c*) *Taunton* v. *Sheriff of Warwickshire*, (1895) 1 Ch. 734; 2 Ch. 319.

(*d*) 29 Car. II. c. 3. See *Driver* v. *Broad*, (1893) 1 Q. B. 744, C. A.

Acts, as against execution creditors; but registration was not necessary against a liquidator under a winding up (*e*); nor is it under the Bills of Sale Act of 1882 (*f*).

A trust deed charging the assets of a company to cover debentures, if duly registered under the Companies Act (*g*), is not a bill of sale within sect. 14 of the Bills of Sale Act, 1882 (*h*).

After-acquired stock in trade.

It was held in an Irish case that a mortgage of the present and future stock in trade, plant, property and effects of a company, will create a valid charge as against the general creditors on all after-acquired stock in trade and property (*i*); but this question may perhaps be regarded as still open to doubt (*k*).

Custody of books, &c.

A mortgage of the whole of the property of a company does not give the right of custody of the company's books and documents to the receiver of the debenture holders as against the liquidator, except as regards such documents as are necessary to support the debenture holders' title (*l*).

Mortgage of future calls.

iii.—**Future Calls.**—Mortgages of future calls are expressly provided for in the statutory form of mortgage appended to the Companies Clauses Consolidation Act, 1845 (*m*), for the use of companies constituted under special Acts. But every mortgage or charge on uncalled capital created on or after 1st January, 1901, must be registered under the Companies Act, 1900, now sect. 93 of the Companies (Consolidation) Act, 1908 (*n*).

Foreclosure.

The remedy of foreclosure is applicable to the uncalled capital of a joint stock company (*o*).

Memorandum must give power to charge future calls.

A mortgage or debenture given by a company cannot effectually charge the proceeds of a future call, unless the memorandum gives power to charge them either expressly or by implication from the terms of the power (*p*). But there is nothing in the Companies Act which prohibits a company from mortgaging its future or unpaid capital: and accordingly,

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(*e*) *Re Marine Mansions Co.*, L. R. 4 Eq. 601.

(*f*) See *ante*, p. 218.

(*g*) See *infra*, p. 511.

(*h*) *Richards* v. *Kidderminster (Overseers of)*, (1896) 2 Ch. 212.

(*i*) *Exp. Cox, Re Dublin Drapery Co.*, 13 L. R. Ir. 174; *post*, p. 507.

(*k*) See *Florence Land, &c. Co.*, 10 Ch. D. 530, C. A. As to future calls, see *post*, p. 508.

(*l*) *Engel* v. *South Metropolitan Brewing, &c. Co.* (No. 2), (1892) 1 Ch. 442.

(*m*) And see *Wickham* v. *New Brunswick Rail. Co.*, L. R. 1 P. C. 64.

(*n*) 8 Edw. VII. c. 69; *post*, p. 511.

(*o*) *Sadler* v. *Worley*, (1894) 2 Ch. 170. And see *post*, Chap. XLIX., Sect. I. (iii).

(*p*) *King* v. *Marshall*, 33 Beav. 565; *Bank of South Australia* v. *Abrahams*, L. R. 6 P. C. 265. And see per Cotton, L.J., in *Re Pyle Works*, 44 Ch. D. 534, at p. 574.

if the memorandum expressly or impliedly gives power to mortgage such capital, and if neither the articles of association nor any resolution imposes any restriction on the exercise of such power, a mortgage of such capital is valid so as to give priority over creditors in a winding up (*q*). Thus, where the memorandum of association of a company specified one of the objects of the company as being "to receive money, or loans, on deposit or otherwise, and upon any security of the company, or upon the security of any property of the company," it was held that these words authorized a charge on uncalled capital (*r*). But a power to mortgage the "property of the company," without more words, will not authorize a mortgage of unpaid capital, a resolution of the directors making a call being a condition precedent to the proprietary right of the company in such capital (*s*). So future calls will not be included in a mortgage or debenture by the words "estates," or "all real and personal estate" of the company (*t*), and a power to mortgage "property and funds" does not authorize a mortgage of uncalled capital (*u*). And a debenture which charges the undertaking of a company and "all the property to which it now is or shall at any time hereafter become entitled, and all the estate, right, title and interest of the company in, to and upon the said premises," does not constitute a charge on the uncalled capital (*x*). A power to mortgage the "assets" of the company will comprise everything which is available to satisfy the liabilities of the company, and, therefore, uncalled capital (*y*). And such a mortgage of future calls has been held to be authorized by a power to charge the "property and rights" of the company (*z*). Where the memorandum contained no reference to borrowing, but the articles authorized the company to borrow upon mortgage of its lands, works, "and other property and effects" for the time being of the company,

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(*q*) *Re Pyle Works*, 44 Ch. D. 534, C. A.; *Re Mayfair Property Co.*, (1898) 2 Ch. 28, C. A. See *Howard* v. *Patent Ivory Manufacturing Co.*, 38 Ch. D. 156; *Re Pyle Works* (No. 2), (1891) 1 Ch. 173.

(*r*) *Newton* v. *Anglo-Australian Co.*, (1895) A. C. 244, J. C.

(*s*) *Bank of South Australia* v. *Abrahams*, L. R. 6 P. C. 265. See *Hulme* v. *Drachenfels, &c. Mining Syndicate*, 2 Manson, 146.

(*t*) *King* v. *Marshall*, 33 Beav. 565. See *Re Marine Mansions Co.*, L. R. 4 Eq. 601.

(*u*) *Re Colonial Trusts Corp., Exp. Bradshaw*, 15 Ch. D. 465, C. A.

(*x*) *Re Russian Spratts' Patent, Lim.*, (1898) 2 Ch. 149, C. A.

(*y*) *Page* v. *International Agency, &c. Trust*, 62 L. J. Ch. 610.

(*z*) *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156.

it was held that the company had power to mortgage its uncalled capital (*a*).

If neither the memorandum nor the original articles give the power, it may be taken by special resolution, unless the memorandum is so framed that the omission implies a prohibition (*b*).

Effect of charge of after-acquired property or future calls.

The result of the decisions seems to be that a charge of after-acquired property or of unpaid calls, if duly authorized and made by apt terms, will be valid as against the company as a going concern. It has been doubted, having regard to the provisions of the Judicature Act, 1875, s. 10, whether a charge of after-acquired property would be supported as against creditors on the winding up of the company (*c*); but the validity of a charge of future calls has been upheld even as against creditors in winding up (*d*). Unpaid calls are not, strictly speaking, the "property," either present or future, of a company, but they are part of the actual capital and assets of a limited company. It would seem that this rule would not apply to an unlimited or guarantee company, so as to render the liability of its members part of its capital (*e*).

Arrears of calls.

In the absence of an express power to mortgage calls, arrears of calls may be mortgaged (*f*), and calls already made, though not yet payable (*g*). If a company mortgage a call, and, before it is received, make another call, it cannot prejudice the mortgagees by getting in the second call at the expense of the first (*h*).

The power of directors to make calls *ipso facto* comes to an end on the winding up of the company (*i*). Debentures charging the undertaking and property, present and future, of the company, including uncalled capital, will include all capital got in before liquidation, but not calls got in during liquidation (*k*).

Where a receiver has been appointed in a debenture holder's action against a company in liquidation, and uncalled capital

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(*a*) *Jackson* v. *Rainford Colliery Co.*, (1896) 2 Ch. 340.

(*b*) *Ibid.; Newton* v. *Anglo-Australian Co.*, *sup.*

(*c*) *Re Florence Land, &c. Co.*, 10 Ch. D. 530, C. A.

(*d*) *Re Pyle Works*, 44 Ch. D. 534, C. A.

(*e*) Per Cotton, L.J., *ibid.* at p. 574.

(*f*) *Re Sankey Brook Coal Co.*, L. R. 9 Eq. 721; 10 Eq. 381; *Gibbs' Case*, L. R. 10 Eq. 312.

(*g*) *Pickering* v. *Ilfracombe Rail. Co.*, L. R. 3 C. P. 235.

(*h*) *Humber Ironworks Co.*, 16 W. R. 474, 667.

(*i*) *Fowler* v. *Broad's Patent Night Light Co.*, (1893) 1 Ch. 724; *Re Streatham and General Estates Co.*, (1897) 1 Ch. 15.

(*k*) *Re Streatham and General Estates Co.*, (1897) 1 Ch. 15. And see *Re Russian Spratts' Patent*, (1898) 2 Ch. 149, C. A.

is included in the security, the receiver may use the name of the liquidator to recover the calls, but the Court will not authorise the debenture holder to nominate a person to recover the calls (*l*).

◆

SECTION IV.

REGISTRATION OF SECURITIES OF COMPANIES.

Register to be kept.

i.—Securities of Railway and other Public Companies.—By sect. 45 of the Companies Clauses Consolidation Act, 1845 (*m*) (which, as has been seen, applies to railway companies and other companies constituted under special Acts), a register of mortgages and bonds is required to be kept by the secretary with the particulars therein specified, and to be open to inspection by all persons interested (*n*).

Statutory form of mortgage.

By sect. 41 of this Act, mortgages and bonds are to be by deed, under the common seal of the company, duly stamped, and wherein the consideration shall be duly stated, and may be in the forms in the schedule to the Act or to the like effect.

Consideration.

The statement of the consideration will be sufficient if it is apparent on the face of the deed, though not expressly stated in terms (*o*).

Accounts of loan capital, &c. of railway companies.

By the Railway Companies Securities Act, 1866 (*p*), provisions are made for making accounts of the loan capital of companies, and for the registration and inspection thereof, and for depositing statements before issuing any debenture stock, and for the declaration to be indorsed on mortgages and bonds, and for specifying in their accounts the particulars of their loan capital, and any new borrowing powers conferred on them.

ii.—Securities under Mortgage Debenture Acts.—A company about to issue mortgage debentures under the Mortgage Debenture Acts (*q*) must produce and deposit for registration

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(*l*) *Re Westminster Syndicate*, (1908) W. N. 236.

(*m*) 8 & 9 Vict. c. 16.

(*n*) *Mutter* v. *Eastern and Mid. Ry.*, 38 Ch. D. 92.

(*o*) *Landowners, &c. Co.* v. *Ashford*, 16 Ch. D. 412.

(*p*) 29 & 30 Vict. c. 108.

(*q*) 28 & 29 Vict. c. 78; 33 & 34 Vict. c. 20. It is believed that only one company has, up to the present time, issued debentures under these Acts.

the securities upon which such debentures are to be founded at the Office of the Land Registry in a register established for that purpose (*r*), and the aggregate principal sum secured by all such mortgage debentures must never at any time exceed the total amount of the securities of the company so registered, nor ten times the amount for the time being uncalled of its subscribed share capital (*s*). New mortgage debentures may be issued by a company in lieu of those from time to time paid off, provided that neither of the limits above mentioned are at any time exceeded (*t*). Holders of mortgage debentures issued under this Act are to be entitled *pari passu* to the benefit of the registered securities upon which such debentures are founded (*u*). The company is also to keep a register of securities (*x*). Registered securities are charged with the payment of the debentures and interest thereon, and are not applicable for any other purpose until discharged from registration (*y*). All mortgage debentures issued by a company under these Acts are to be registered at the Office of the Land Registry, and indorsed with a memorandum of such registration, without which indorsement no mortgage debenture is to be a charge under the Acts on the registered securities of the company (*z*).

Deposit of securities with registrar.

The Court has no power to order securities deposited with the registrar to be delivered up to a receiver appointed in a debenture holder's action, or to a liquidator in the winding up of the company (*a*).

Companies Act, 1908.

iii.—Registration of Securities of Joint Stock Companies. —By sect. 100 of the Companies Act, 1908 (*b*), every limited company under the Act must keep a register of all mortgages and charges specifically affecting the property of the company, with such particulars as in the Act specified, under a penalty not exceeding 50*l*., upon every director, manager, and other officer of the company party or privy to the omission to register; and by sect. 101 such register is to be open to inspection by any creditor or member of the company. This right

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(*r*) 28 & 29 Vict. c. 78, ss. 6, 7, 9.

(*s*) *Ibid.* s. 11.

(*t*) *Ibid.* s. 13.

(*u*) *Ibid.* s. 15.

(*x*) *Ibid.* s. 27.

(*y*) 33 & 34 Vict. c. 20, s. 7.

(*z*) 28 & 29 Vict. c. 78, ss. 32, 33.

(*a*) *Somerset* v. *Land Securities Co.*, (1894) 3 Ch. 464, C. A.

(*b*) 8 Edw. VII. c. 69.

of inspection includes a right to take copies of the register (*c*), but is determined by an order to wind up the company (*d*).

This section will apply to mortgages or charges not falling within the Companies Act, 1908, s. 93.

The section applies only to mortgages and charges effected by the company itself, not to pre-existing incumbrances subject to which the company acquired the property (*e*).

Companies Act, 1908, s. 93.

By the Companies Act, 1900, now sect. 93 of the Companies (Consolidation) Act, 1908 (*f*), every mortgage or charge created by a company after 1st July, 1908, must be registered in manner required by the Act if it falls within any of the following classes: (a) a mortgage or charge for the purpose of securing any issue of debentures; (b) a mortgage or charge on uncalled capital; (c) a mortgage or charge created or evidenced by an instrument which if executed by an individual would require registration as a bill of sale; (d) a mortgage or charge on any land wherever situate or any interest therein; (e) a mortgage or charge on any book debts of the company; (f) a floating charge on the undertaking or property of the company.

Every such mortgage or charge will be void, as against the liquidator and creditors, so far as any security on the company's property or undertaking is thereby conferred, unless it is filed for registration with the Registrar of Companies within twenty-one days after the date of its creation (*g*). It is the duty of the company to register, but any person interested may do so (*h*). A copy of each charge is to be kept at the company's office, and is to be open to inspection by members and creditors of the company (*i*). The registrar is to keep a register of all charges, which is to be open to public inspection (*k*). Special provision is made for the registration of charges on property abroad (*l*), for the registration of a series of debentures *en bloc* (*m*), and of each issue of the same series (*n*). The registrar's certificate is conclusive evidence of registration (*o*),

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(*c*) *Nelson* v. *Anglo-American Land Mortgage Co.*, (1897) 1 Ch. 130.

(*d*) *Somerset* v. *Land Securities Co.*, W. N. (1897) 29.

(*e*) *Re General Horticultural Co.*, 53 L. T. 699. See *Re Underbank Spinning, &c. Co.*, 31 Ch. D. 226.

(*f*) 8 Edw. VII. c. 69, s. 93.

(*g*) *Ibid.* s. 93 (1); *Re Harrogate Estates, inf.*

(*h*) *Ibid.* s. 93 (7).

(*i*) *Ibid.* ss. 93 (9), 101, 102.

(*k*) *Ibid.* ss. 93 (2), 101.

(*l*) *Ibid.* s. 93 (1),

(*m*) *Re Harrogate Estates*, (1903) 1 Ch. 498.

(*n*) 8 Edw. VII. c. 69, s. 93 (3).

(*o*) *Ibid.* s. 93 (5); *Re Yolland*, (1908) 1 Ch. 152.

and the company is to endorse on every debenture and debenture stock certificate a copy of the registrar's certificate (*p*). Provision is made for rectifying the register (*q*), and for entering thereon a memorandum of satisfaction of any charge paid off (*r*).

The section in effect provides for double registration, that is with the Registrar and at the company's office.

A security replaced from time to time by a fresh security within twenty-one days does not require registration and is not illegal (*s*).

A deed by which property already covered by a floating charge becomes the subject of a specific charge requires registration (*t*). But a deed to which the company is not a party and which simply carries into effect a sale and re-investment by the trustees of a previous deed does not require registration (*u*).

If a covering deed contains specific equitable charges on specific properties, and the particulars required by sect. 93 (3) are registered, the registration will cover subsequent mortgages of those specific properties required to complete the security and also mortgages of properties substituted therefor under the powers of the covering deed (*x*).

A floating charge is an equitable charge on the assets for the time being of a going concern, but it need not be on the whole undertaking or property (*y*). If created within three months of the winding-up, it is invalid unless the company was solvent at the time (*z*).

Registration under sub-sect. 3 protects all debentures issued not more than twenty-one days before registration and all debentures subsequently issued (*a*). The sub-section applies to an issue of debenture stock secured by a deed which creates the security, and the debenture contains no charge (*b*), or there is no debenture, but only certificates of debenture stock (*c*).

(*p*) 8 Edw. VII. c. 69, s. 93 (6).

(*q*) *Ibid.* s. 96.

(*r*) *Ibid.* s. 97.

(*s*) *Renshaw & Co.*, (1908) W. N. 210.

(*t*) *Cornbrook Co.* v. *Law Debenture*, (1904) 1 Ch. 103.

(*u*) *Bristol Breweries* v. *Abbot*, (1908) 1 Ch. 279.

(*x*) *Cunard Co.* v. *Hopwood*, (1908) 2 Ch. 564.

(*y*) *Re Yorkshire Woolcombers*, (1903) 2 Ch. 284; (1904) A. C. 355.

(*z*) 8 Edw. VII. c. 69, s. 212; *ante*, p. 503.

(*a*) *Re Harrogate Estates*, (1903) 1 Ch. 498.

(*b*) *Ibid.*

(*c*) *Cunard Co.* v. *Hopwood*, (1908) 2 Ch. 564.

Debentures sealed but not issued can be replaced by other debentures sealed and issued, and the registration of the latter will be effectual (*d*).

Registration seems to be necessary where the security is created by deposit (*e*), or where there is a hypothecation of book debts (*ce*).

An order under sect. 96 extending the time for the registration of debentures should be made without prejudice to rights acquired prior to the actual registration (*f*), and should be framed so as not to interfere with the rights of debenture holders *inter se* (*g*). Such an order will not operate retrospectively so as to defeat creditors in a winding up (*h*). The rights to be saved are rights against property (*i*), and therefore the Court will not protect the rights of an unsecured creditor (*k*). But if the company has gone into liquidation, the creditors have acquired rights against property (*l*).

(*d*) *Re Defries & Co.*, (1904) 1 Ch. 37.

(*e*) 11 Ch. D. at p. 585.

(*ee*) *Ladenburg* v. *Goodwin*, 56 Sol. Jo. 722.

(*f*) *Re Abrahams & Sons*, (1902) 1 Ch. 695.

(*g*) *Re Johnson & Co.*, (1902) 2 Ch. 101, C. A.

(*h*) *Re Anglo-Oriental Carpet Co.*, (1903) 1 Ch. 914.

(*i*) *Re Ehrmann Brothers*, (1906) 2 Ch. 697.

(*k*) *Re Cardiff Cottage Hospital*, (1906) 2 Ch. 627.

(*l*) *Re Anglo-Oriental Carpet Co.*, *sup.*

CHAPTER XXVIII.

MORTGAGES BY PARTNERS.

General rule as to authority of partner to bind firm.

i.—Of the Power of a Partner to bind the Firm by borrowing and giving Securities for Loans.—The existence of a partnership implies such a relation between the partners as that each of them is a principal, and each of them an agent for the other (*a*). And, accordingly, as a general rule, every partner who does any act necessary for, or usually done in, carrying on business of the kind carried on by the firm of which he is a member, thereby binds his partners to the same extent as if he were their agent duly appointed for that purpose, unless the partner so acting has, in fact, no authority to act for the firm in some particular manner, and the person with whom he is dealing knows that he has no such authority (*b*).

Power to borrow money.

The power of a partner to borrow money on behalf of the firm rests on this principle of partnership agency, by which every member of a firm has, as regards third parties, an implied authority to do all such acts as are necessary for carrying on the business of the firm in the ordinary manner, so as to relieve the person dealing with him from the duty of making further inquiries (*c*). This power is not, however, incidental to every business; whether and to what extent it exists depends upon the nature of the particular business. It may, however, be laid down as a general rule that one partner has an implied power to borrow on behalf of the firm to pay existing debts of the firm incurred in the business (*d*).

(*a*) Per O'Brien, J., in *Shaw* v. *Galt,* 16 Ir. Com. L. R. 357. See *Cox* v. *Hickman,* 8 H. L. C. at p. 312; *Holme* v. *Hammond,* L. R. 7 Ex. 218, 230; *Pooley* v. *Driver,* 5 Ch. D. 458.

(*b*) *Baird's Case,* L. R. 5 Ch. at p. 733. See *Bullen* v. *Sharp,* L. R. 1 C. P. 86; *Mollwo* v. *Court of Wards,* L. R. 4 P. C. 419.

(*c*) *Okell* v. *Eaton,* 31 L. T. 330. See *Harrison* v. *Jackson,* 7 T. R. 210; *Rothwell* v. *Humphries,* 1 Esp. 406; *Thicknesse* v. *Bromilow,* 2 Cr. & J. 425.

(*d*) *Brown* v. *Kidger,* 3 H. & N. 853.

Partner cannot bind firm limited by scope of business.

But one partner has no authority to bind his co-partners by borrowing money otherwise than in the ordinary course of business for business purposes (*e*). So, where the business of a firm is such as, according to the custom of the particular trade, to be usually conducted on ready-money principles, the firm will not be liable to repay moneys borrowed by one of the partners, unless it can be shown that he had express authority to bind the firm by borrowing money (*f*). If the lender has knowledge or notice that a partner borrowing money has no authority to do so, the firm will not be bound (*g*).

Partner borrowing on separate credit.

Where a partner borrows money on his separate credit, the other members of the firm will not be bound to repay the loan merely because it is proved, as a fact, that the money was applied for the purposes of the partnership (*h*).

Power of partner to give security on partnership property by pledge or equitable charge.

Where a partner has express or implied authority to borrow money on behalf of the firm, it follows that he has power to give security on the property of the firm for advances. Accordingly, as will be seen hereafter, a partner has a power to pledge partnership chattels as security for a loan (*i*).

An equitable mortgage by one partner by deposit of title deeds relating to partnership real estate is valid in all cases where the partner has power to borrow (*k*), and this applies to a surviving partner after dissolution (*l*).

Partner cannot bind firm by deed.

It is, however, a well-settled rule that one partner cannot bind the firm by deed unless expressly authorized so to do (*m*). In one case, indeed, a bill of sale executed by one partner on behalf of himself and another was held to be binding on both: but in that case it was shown that the partner who executed the deed did so in the name and in the presence of his co-partner, and it was held that the other partner must have treated the deed as his own, though he did not actually seal and deliver it (*n*). So, it was held that a warrant of attorney under seal,

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(*e*) *Plumer* v. *Gregory*, L. R. 18 Eq. 621. See *Dickinson* v. *Valpy*, 10 B. & Cr. 128; *Ricketts* v. *Bennett*, 4 C. B. 686; *Brettel* v. *Williams*, 4 Exch. 630.

(*f*) *Hawtayne* v. *Bourne*, 7 M. & W. 565.

(*g*) *Fisher* v. *Taylor*, 2 Ha. 218; *Re Worcester Corn Exchange Co.*, 3 De G. M. & G. 180.

(*h*) *Emly* v. *Lye*, 15 East, 7; *Lloyd* v. *Freshfield*, 2 C. & P. 325. See *Re Ritson*, 79 L. T. 455, C. A.

(*i*) *Post*, Chap. LXIII.

(*k*) Lindley on Partnership (7th ed.), 166. See *Re Clough*, 31 Ch. D. 324.

(*l*) *Re Bourne*, (1906) 2 Ch. 427.

(*m*) *Harrison* v. *Jackson*, 7 T. R. 207; *Steiglitz* v. *Eggington*, Holt, 141.

(*n*) *Ball* v. *Dunsterville*, 4 T. R. 313. See *Burn* v. *Burn*, 3 Ves. 578.

executed by one partner alone with the verbal consent of the other, bound the firm (*o*).

Deed, when binding on executing partners.

It may be observed that, if a partner executes a deed on behalf of himself and his co-partners, the deed will bind him, though it will not bind the firm (*p*). But if he executes the deed, not on behalf of his co-partners, but merely as one of the members of the firm, and with the expectation that his co-partners will execute it, he will not be bound unless the others execute (*q*).

Legal mortgage must be by all partners.

It follows, from the general rule that express authority is necessary to enable a partner to bind the firm by deed, that a legal mortgage of property of the partnership cannot, in the absence of such authority, be made without the concurrence of all the partners (*r*). Any such authority must itself be under seal (*s*), and the fact that the partnership articles are under seal does not, of itself, confer such authority (*t*).

Surviving partner.

But a surviving partner has power to mortgage the partnership property, whether real or personal, to secure a partnership debt, and such a mortgage will take priority over the deceased partner's partnership lien (*u*).

Equitable security.

A partner having power to borrow on the credit of the firm may probably give a valid equitable security by deposit of deeds or otherwise over any real estate of the partnership (*x*).

Advances made after change in firm.

ii.—Effect of Change in Firm on Securities on Partnership Property.—A mortgage or charge upon partnership property given to secure a present loan and future advances will not, as a general rule, cover advances made after a change in the firm by which the security is given (*y*).

Extension of charge by agreement.

But the original security may be made available to cover such advances by subsequent agreement between the lender and the members of the firm as newly constituted. So, an equitable mortgage by deposit of deeds may be extended by parol agree-

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(*o*) *Brutton* v. *Burton*, 1 Chit. G. P. 707.

(*p*) *Elliot* v. *Davis*, 2 B. & P. 338; *Hawkshaw* v. *Parkins*, 2 Swanst. 543; *Cumberlege* v. *Lawson*, 1 C. B. N. S. 709; *Latch* v. *Wedlake*, 11 A. & E. 959.

(*q*) See *Antram* v. *Chace*, 15 East, 209.

(*r*) Lindley on Partnership (7th ed.), 165.

(*s*) *Steiglitz* v. *Eggington*, Holt, 141.

(*t*) *Harrison* v. *Jackson*, 7 T. R. 207.

(*u*) *Re Bourne*, (1906) 2 Ch. 427.

(*x*) Lindley (7th ed.), 166. And see *Re Clough*, 31 Ch. D. 324.

(*y*) *Bank of Scotland* v. *Christie*, 8 Cl. & F. 214. See *Exp. Kensington*, 2 V. & B. 3.

ment so as to cover further advances after a change in the firm (*z*).

Extension of legal mortgage.

A legal mortgage cannot, of course, be extended so as to operate as such for securing further advances after a change in the firm, unless the agreement to that effect is made under seal (*a*). But it may be extended by writing not under seal so as to be available as an equitable security for such advances (*b*).

Deposit to secure private debt of partner.

Where a partner deposited with the bankers of the firm, who were also his private bankers, certificates of railway shares belonging to the firm as security for his own debt, it was held that the deposit did not cover advances made by the bank to the firm (*c*).

Liability of lender under former law for partnership losses.

iii.—Loans to Partnerships in consideration of sharing Profits.—Advances to partnerships are sometimes made upon the terms that the lender, instead of receiving a fixed rate of interest on the money advanced, shall be entitled to a share in the profits, or to interest at a rate varying with the amount of the profits. Formerly, such an arrangement exposed the lender to the risk of being held to be a partner in the borrowing firm, and liable, by reason of his sharing in the profits, to bear the losses of the firm.

Sharing profits no longer of itself a test of partnership.

In order to amend the law in this respect, the Act, commonly called Bovill's Act (*d*), was passed in 1865. This Act has been repealed, but is virtually re-enacted by the Partnership Act, 1890 (*e*), which enacts as follows:—

Rules for determining existence of partnership.

Sect. 2 (3). "The receipt by a person of a share of the profits of the business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business, and in particular—

(a) The receipt by the person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of the business does not of itself make him a partner in the business, or make him liable as such.

(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with

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(*z*) *Exp. Lloyd*, 1 Gl. & J. 389. See *Exp. Lane*, De G. 300; *Exp. Nettleship*, 2 M. D. & De G. 124.

(*a*) See *Exp. Hooper*, 2 Rose, 328.

(*b*) *Exp. Parr*, 4 D. & C. 426.

(*c*) *City Bank Case*, 3 De G. F. & J. 629. See *Exp. Freen*, 2 Gl. & J. 246; *Chuck* v. *Freen*, 1 Moo. & M. 259.

(*d*) 28 & 29 Vict. c. 86.

(*e*) 53 & 54 Vict. c. 39.

> that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing and signed by all parties thereto."

Contract in writing.

The rule that the contract must be in writing and signed by the parties was the same under Bovill's Act (*f*).

How far the statutory protection extends.

It is to be observed that sect. 2 of the Act merely provides that the fact that a loan is made at interest varying with the profits shall not "of itself" render the lender a partner, and does not exempt the lender from liability as such if the effect of the transaction is in other respects such as to render him a dormant partner. So, it has been repeatedly held under Bovill's Act, that, where it appears upon the whole agreement that the person advancing the money really does so as a partner, and not by way of loan, he will not be protected from being liable as a partner merely because the agreement contains a declaration that the money is advanced by way of loan under the Act, and that the alleged lender shall not be liable as a partner (*g*).

Syers v. *Syers.*

Where an agreement for a loan was executed in the following terms, "In consideration of the sum of 250*l.* this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share of the profits of the Oxford Music Hall and Tavern to be drawn up under the Limited Partnerships Act, commonly called an 'Act to amend the Law of Partnership,'" it was held that the agreement constituted a partnership at will, with an implied stipulation that, as between the parties themselves, the person taking the one-eighth share of the profits should be indemnified against loss (*h*).

Badeley v. *Consolidated Bank.*

On the other hand, where a person advanced money to a railway contractor, and the parties executed a deed whereby the contractor assigned to the lender all his machinery, plant, &c. as security for the loan, and agreed that the lender should receive a fixed rate of interest on the money advanced, and also a share on the profits, it was held, on the construction of the deed, and of correspondence that passed between the parties,

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(*f*) See *Pooley* v. *Driver*, 5 Ch. D. 458.

(*g*) *Exp. Mills, Re Tew*, L. R. 8 Ch. 569; *Pooley* v. *Driver*, 3 Ch. D. 458; *Exp. Delhasse, Re Megevand*, 7 Ch. D. 511, C. A.

(*h*) *Syers* v. *Syers*, 1 App. Ca. 174.

that there was no evidence of a partnership so as to render the lender liable for the debts of the contractor (*i*).

By the Act of 1890, it is further enacted as follows:—

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.

> Sect. 3. "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied."

The section is not confined to contracts in writing (*k*).

Effect of this enactment.

It will be observed that the above section affects only the right of the lender to prove in bankruptcy or under a composition, and does not expressly, or as it would seem impliedly, deprive a secured creditor of the benefit of his security (*l*), and he may enforce such security by foreclosure or sale (*m*). So where a loan was made to a trader at a rate of interest varying with the profits of his business, upon the security of a mortgage of the business premises and of the goodwill of the business, the trader having become bankrupt, it was held that the rights of the mortgagee under his mortgage were in no way affected by sect. 5 of Bovill's Act.

A person advancing money in consideration of a share of profits cannot prove in competition with any creditor of the trader or firm to whom the money is advanced, whether their claims arose before the agreement for the loan, or after it has been terminated, and other security has been given for the advances made under it (*n*).

Where a person so advancing money also makes other advances to the same trader or firm at a fixed rate of interest, he may prove for the latter *pari passu* with the other creditors (*o*). But if a person lends money on the terms of sharing profits, and afterwards, in lieu thereof, agrees to take a fixed rate of

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(*i*) *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238, C. A. See *Davis* v. *Davis*, (1894) 1 Ch. 393.

(*k*) *Re Fort, Exp. Schofield*, (1897) 2 Q. B. 495.

(*l*) *Exp. Sheil, Re Lonergan*, 4 Ch. D. 789.

(*m*) *Badeley* v. *Consolidated Bank*, *sup.*

(*n*) *Exp. Taylor, Re Grayson*, 12 Ch. D. 366. See *Re Hildesheim*, (1893) 2 Q. B. 357, C. A.

(*o*) *Exp. Mills, Re Tew*, L. R. 8 Ch. 569.

interest, he comes within sect. 3 of the Act, and cannot prove in competition with the other creditors (*p*).

If an agreement for a loan shows an intention that the rate of interest shall in some manner vary with the profits, but is expressed in such vague and uncertain terms that it is impossible to say in what mode such rate of interest is to be ascertained, the agreement will be void for uncertainty, and the lender will be entitled to prove *pari passu* with the other creditors as for money lent (*q*).

Mortgagee of share does not become a partner.

iv.—Mortgage of Share in Partnership.—It is one of the fundamental principles of partnership law that no person may be introduced as a partner without the consent of all existing partners (*r*). A partner cannot, therefore, by assigning his share, impose the assignee on the firm as a partner against the will of the other members (*s*).

Nature of mortgage of share.

But there is nothing to prevent a partner from assigning or charging his share without the consent of his co-partners; and even before the Partnership Act, 1890, it was held that the assignee or incumbrancer of a share was entitled to payment of what, upon the accounts being taken, appear to be due to the partner in respect of his share (*t*); and it would seem that the mortgagee of a share in a partnership could require from the other partners an account of the mortgagor's interest in the partnership (*u*).

The rights of the assignee of a share in a partnership are now regulated by the Act of 1890 (*x*), which enacts as follows:—

Rights of assignee of share in partnership.

Sect. 31. "(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners."

(*p*) *Re Stone*, 33 Ch. D. 541.

(*q*) *Re Vince*, (1892) 2 Q. B. 478.

(*r*) Partnership Act, 1890, s. 24, sub-s. 7.

(*s*) *Jefferys* v. *Smith*, 3 Russ. 158.

(*t*) *Bentley* v. *Bates*, 4 Y. & C. 182; *Glynn* v. *Hood*, 1 De G. F. & J. 334; *Smith* v. *Parks*, 16 Beav. 115; *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *Cavander* v. *Bulteel*, L. R. 9 Ch. 79.

(*u*) *Whetham* v. *Davey*, 30 Ch. D. 574. But see *contra*, *Brown* v. *De Tastet*, Jac. 284.

(*x*) 53 & 54 Vict. c. 39.

"(2.) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

It will be observed that by sub-sect. (1), the right of the assignee to compel the other partners to account is expressly negatived. It gives to the assignee no right to interfere with or object to anything done in the management or administration of the partnership business, and anything so done is binding on the assignee (*y*). So long as the partnership continues the mortgagee is precluded from interfering in the management of the partnership or requiring accounts, and must accept the account of profits agreed to by the partners; but immediately upon a dissolution he becomes entitled to have an account taken as from the dissolution for the purpose of ascertaining and receiving the actual share of the mortgagor in the partnership assets, quite irrespective of any agreement between the partners as to the value of such share (*z*), and irrespective of any account taken in an arbitration between the partners (*a*).

Registration under Bills of Sale Acts not necessary.

Upon the principle that the only right of the mortgagee of a share in a partnership is to receive the share of profits of the assignor, it has been held that a mortgage of such a share does not require registration as a bill of sale by reason of its including the mortgagor's share in the goods and chattels of the partnership (*b*).

Charging order on partner's share.

A judgment creditor of a partner, though he cannot issue execution against the partnership property, may obtain a charging order on the partner's interest in the partnership property and profits for the amount of the judgment debt and interest. But the other partner or partners may at any time redeem the interest charged, or in case of a sale being directed, may purchase the same (*c*).

Such a charging order is not a transaction protected by sect. 49 of Bankruptcy Act, 1883; nor is it a "completed execution" within sect. 45 if the partners pay the money into Court in redemption of the interest charged (*d*).

(*y*) *Re Garwood*, (1903) 1 Ch. 236.

(*z*) *Watts* v. *Driscoll*, (1901) 1 Ch. 294, C. A.

(*a*) *Bonnin* v. *Neame*, (1910) 1 Ch. 732.

(*b*) *Re Bainbridge, Exp. Fletcher*, 8 Ch. D. 218.

(*c*) 53 & 54 Vict. c. 39, s. 23.

(*d*) *Wild* v. *Southwood*, (1897) 1 Q. B. 317.

CHAPTER XXIX.

OF MORTGAGES TO TRUSTEES.

SECTION I.

OF MORTGAGE INVESTMENTS BY TRUSTEES OF SETTLEMENTS AND WILLS.

Court did not formerly sanction mortgage investments of trust moneys.

i.—Of the Power of Trustees to Invest on Mortgage generally.—Formerly, where trustees had no express power under the instrument creating the trust to invest on mortgage, the Court generally restricted them to investments in Consols, and did not sanction or countenance an investment of trust moneys on real security, except under special circumstances (*a*).

Relaxation of the rule.

But, in later times, this rule was to some extent relaxed (*b*); and mortgage investments of trust moneys are, under certain conditions, now authorized by the statutory enactments to be presently considered.

Leaving part of purchase-money on mortgage.

So, formerly, it was considered that, on a sale by trustees, they were not justified in leaving part of the purchase-money on mortgage of the land sold (*c*). But now that trustees are authorized to invest on good and sufficient real security, there cannot be any objection to their so doing.

Where trustee-mortgagees sold under a power of sale contained in their mortgage, and allowed part of the purchase-money to remain on a mortgage of the same property given by the purchaser, it was held that the power of sale was duly exercised (*d*).

When trustees must obtain sanction of

Trustees, though expressly empowered by the terms of their trust to invest on good and sufficient security at interest, must

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(*a*) *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104.

(*b*) See *Ungless* v. *Tuff*, 9 W. R. 729.

(*c*) *Davey* v. *Durrant*, 1 De G. & J. 535.

(*d*) *Thurlow* v. *Mackeson*, L. R. 4 Q. B. 97. See *Cookson* v. *Lee*, 23 L. J. Ch. 473.

not lend trust moneys on mortgage after a decree for account without the sanction of the Court (*e*).

Court to mortgage investments.

Liability of trustees for loss.

Where an action is brought for the administration of a trust estate, if the trustees have invested on mortgage contrary to the trust, or in disobedience of an order to the contrary, the executors or trustees will be responsible for the loss; but otherwise the mortgage will be a fund in their hands, which they will be ordered to pay into Court (*f*).

Discretion of trustees.

The Court will not interfere with the discretion of trustees as to the choice of investments, unless it is shown that that discretion is being exercised in an improper manner, or upon unreasonable grounds (*g*).

Mortgage investments of moneys of infants.

With respect to infants, they are, of course, incapable of lending money on mortgage; nor has the guardian or trustee, nor even the Court, any power to change the nature of the infant's estate.

If an infant has money outstanding, although the Court will not interfere with the discretion of the trustees in investing such moneys on real security or otherwise, provided the investment is in accordance with statutory provision or the terms of the trust, and in other respects proper, yet it will not itself authorize the investment of money of infants in real security, except under special circumstances (*h*). An inquiry, however, may be directed whether it will be for the benefit of an infant that uninvested moneys belonging to him should be laid out in the purchase of any existing charge on his own real estate (*i*); but, in such case, the charge is kept alive for the benefit of his personal estate, in case he should die under twenty-one (*k*).

Moneys of lunatics.

The committee of a lunatic will not, in general, be allowed to invest the property of a lunatic on real security except in very peculiar cases; as where the lunatic has an interest in the estate, or the investment is in some other manner connected with his immediate interests. Money belonging to the lunatic has been ordered to be lent on mortgage, for the accommodation of his family, on the condition of its being the first incumbrance on the estate (*l*).

(*e*) *Widdowson* v. *Duck*, 2 Mer. 494. See *Bethell* v. *Abraham*, L. R. 17 Eq. 24.

(*f*) *Widdowson* v. *Duck*, 2 Mer. 494.

(*g*) *Lee* v. *Young*, 2 Y. & C. C. C. 532; *Re Hotham*, *ante*, p. 399.

(*h*) *Norbury* v. *Norbury*, 4 Madd. 191; *Bate* v. *Hooper*, 5 De G. M. & G. 338.

(*i*) Simpson on Infants (3rd ed.), 311.

(*k*) *Seys* v. *Price*, 9 Mod. 217, 221; *Exp. Phillips*, 19 Ves. 122.

(*l*) *Exp. Calthorpe*, 1 Cox, 182; *Exp. Ellis*, Jac. 234; *Exp. Johnson*, The discharge of incumbrances is one of the objects for which under the Lunacy Act, 1890 (*m*), the property of a lunatic may be mortgaged; and therefore his personalty may, if for his benefit, be laid out in the purchase of a charge on his real estate.

Trustees must exercise due diligence.

In the exercise of his discretionary power of investment, a trustee is bound not only to employ the same degree of diligence that a man of ordinary prudence would exercise in the management of his own private affairs, but he must also avoid all investments attended with hazard (*n*). The rule is thus laid down by Lindley, L. J. (*o*): "The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide."

Consents must be obtained in strict accordance with terms of trust.

Any consent to investment required by the instrument creating the trust must be obtained in strict accordance with the terms of the instrument. So if a written consent is required, parol consent will not be sufficient (*p*). If a previous consent is required, a subsequent consent would not protect the trustees (*q*). And generally a subsequent consent is ineffectual (*r*), unless the person whose consent is required shows his acquiescence by some act, as by receiving dividends arising from the new investment, without objection (*s*). The consent must not be prospective, but must be given in respect of a particular investment (*t*).

Dispensing with consent.

If consent is required to the calling in of trust funds, the trustee will not be liable if the funds are lost before the consent is given (*u*). But the Court will protect the remainderman by dispensing with consent if the funds are in danger (*x*). So, also, where the person whose consent is required was a lunatic (*y*).

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1 Moll. 128. As to transfer of debentures of a lunatic, see *Re Mitchell,* 17 Ch. D. 515, C. A.; and see 53 & 54 Vict. c. 5, s. 136.

(*m*) 53 Vict. c. 5, s. 117, *ante,* p. 360.

(*n*) Per Lord Watson, in *Learoyd* v. *Whiteley,* 12 App. Ca. 727, at p. 733. See *Speight* v. *Gaunt,* 9 App. Ca. 1; *Knox* v. *Mackinnon,* 13 App. Ca. 753; *Rae* v. *Meek,* 14 App. Ca. 558.

(*o*) *Re Whiteley, Whiteley* v. *Learoyd,* 33 Ch. D. 347, at p. 355; affirmed in D. P. *sub nom. Learoyd* v. *Whiteley, sup.*

(*p*) *Cocker* v. *Quayle,* 1 R. & My. 535; *Norris* v. *Wright,* 14 Beav. 291.

(*q*) *Stevens* v. *Robertson,* 37 L. J. Ch. 499.

(*r*) *Bateman* v. *Davis,* 3 Madd. 98.

(*s*) *Stevens* v. *Robertson, sup.; Re Massingberd, Clarke* v. *Trelawney,* 63 L. T. 296.

(*t*) *Child* v. *Child,* 20 Beav. 50.

(*u*) *De Manneville* v. *Crompton,* 1 V. & B. 354.

(*x*) *Costello* v. *O'Rorke,* Ir. R. 3 Eq. 172.

(*y*) *Re J——,* 15 Ch. D. 78.

Sale of stock for re-investment on mortgage.

Where trustees have an express or statutory power to vary investments, they are justified in selling out stock, or realizing any existing security or other investment of the trust funds, and in investing the proceeds on mortgage; and it would seem clear that if the sale is made *bonâ fide*, the trustees will not be liable if the fund realized is less than that for which the stock or other investment was originally bought (*z*).

No apportionment of proceeds to income.

The trustees should time the change of investment so that the interest on the mortgage shall begin to run as soon as possible after the receipt of a dividend on the stock sold; otherwise, the tenant for life will not be entitled to apportionment to income of any part of the proceeds of sale (*a*), except under very special circumstances (*b*).

Liability for improper sale and re-investment.

If trustees sell out stock for the purpose of investing the proceeds of sale on improper security, the impropriety of the investment will vitiate the sale, so that the trustees will be liable, at the option of the beneficiary, either to replace the stock, or to repay the proceeds of sale (*c*).

Replacement of stock.

If the stock is replaced, the intermediate dividends must be accounted for and paid (*d*).

Repayment of proceeds of sale.

If the proceeds of sale are repaid, interest from the time of sale till repayment will be chargeable against the trustees at the rate of five per cent. per annum (*e*).

Retaining existing securities.

An executor or trustee is not called upon to realize money outstanding on mortgage security (*f*), even though the security may have fallen in value (*g*). And, if directed to invest a legacy on real security, he may appropriate a subsisting mortgage of the testator (*h*). But in either case he must satisfy himself as to the sufficiency of the security; if it should appear to be inadequate, he should require the mortgage to be paid off even though the person whose consent is required to changes of investment refuses such consent (*i*). There is, however, no rule

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(*z*) See Lewin on Trusts (10th ed.), 359.

(*a*) *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173; *Freeman* v. *Whitbread*, L. R. 1 Eq. 266.

(*b*) *Lord Londesborough* v. *Somerville*, 19 Beav. 295.

(*c*) *Re Massingberd's Settlement*, 63 L. T. 296. See *Head* v. *Gould*, (1898) 2 Ch. 250.

(*d*) *Davenport* v. *Stafford*, 14 Beav. 319, 335.

(*e*) *Crackelt* v. *Bethune*, 1 J. & W. 587; *Jones* v. *Foxall*, 15 Beav. 392. As to the present rate of interest, see *Re Barclay*, (1899) 1 Ch. 674; *Re Davis*, (1902) 2 Ch. 314.

(*f*) *Orr* v. *Newton*, 2 Cox, 274. See *Howe* v. *Lord Dartmouth*, 7 Ves. 150.

(*g*) *Re Chapman, Cocks* v. *C.*, (1896) 2 Ch. 763, C. A.

(*h*) *Ames* v. *Parkinson*, 7 Beav. 359. See *Fraser* v. *Murdoch*, 6 App. Ca. 855.

(*i*) *Harrison* v. *Thexton*, 4 Jur.

that trustees of a will are under an absolute duty, without exercising their discretion, to call in securities within twelve months from the death, even though some of the securities may be of a risky nature (*k*).

Trustees, it seems, are under no obligation to make periodical investigations as to the sufficiency of the security or the solvency of the mortgagor (*l*).

The Court has no jurisdiction to allow unauthorized investments to be retained by trustees, however beneficial it might be for infant beneficiaries (*m*).

Statutory powers to invest on mortgage.

ii.—Statutory Powers of Trustees to invest on Real Securities.—By the Law of Property Amendment Act, 1859 (*n*), trustees, executors, and administrators, unless expressly forbidden by the terms of the trust, were empowered to invest on real securities in any part of the United Kingdom.

This enactment was repealed, but virtually re-enacted, by the Trust Investment Act, 1889 (*o*), which applied to trusts created before as well as to trusts created after the passing of the Act. This Act was, in its turn, repealed (except as to sects. 1 and 7, which are immaterial to the present purpose) by the Trustee Act, 1893 (*p*).

Trustee Act, 1893, s. 1.

By sect. 1 of the last-mentioned Act, a trustee may, unless forbidden by the instrument creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in (amongst other investments) real or heritable securities in Great Britain or Ireland, and may also from time to time vary such investments. This power applies as well to trusts created before as to trusts created after the passing of this Act (*q*), and is in addition to the powers, if any, contained in the instrument creating the trust (*r*); but the power can only be exercised by the trustees subject to any consent required by the instrument creating the trust (*s*).

Meaning of "trust" and "trustee."

By sect. 50, the expressions "trust" and "trustee" are thus defined for the purposes of this Act:—

"The expression 'trust' does not include the duties incident to an estate conveyed by way of mortgage; but, with this exception,

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N. S. 550. See *Ames* v. *Parkinson*, *sup.*

(*k*) *Re Chapman, Cocks* v. *Chapman*, (1896) 2 Ch. 763, C. A.

(*l*) *Post*, p. 544.

(*m*) *Re Tollemache*, (1903) 1 Ch. 955, C. A.

(*n*) 22 & 23 Vict. c. 35, s. 32. See *Re Simson's Trusts*, 1 J. & H. 89.

(*o*) 52 & 53 Vict. c. 32.

(*p*) 56 & 57 Vict. c. 53.

(*q*) 22nd September, 1893.

(*r*) See sect. 4 of the Act.

(*s*) See sect. 3 of the Act.

the expressions 'trust' and 'trustee' include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person."

The first part of this section relates exclusively to an estate conveyed by way of mortgage while the mortgage security continues to exist as such. The Act, it seems, applies to property on mortgage where the instrument of charge contains an express trust (*t*).

Statutory power to invest trust moneys on real securities.

Sect. 1 of the Act of 1893 also empowers trustees to invest in any of the securities for the time being authorized for the investment of cash under the control or subject to the order of the High Court. But, so far as mortgage investments are concerned, the rule of Court at present in force is more restricted than the statutory power, the former authorizing only investments on mortgage of freehold and copyhold estates respectively in England and Wales.

Investments on heritable securities in Scotland.

The expression "heritable" seems to authorize trustees of English and Irish trust instruments to invest on the security of heritable property in Scotland, which includes not only what in England would be deemed to be real property, but also leaseholds, unless heirs are expressly excluded by the terms of the lease from taking (*u*). But such investments of trust funds are not generally to be recommended, having regard to the consideration that the law as to land and the practice of conveyancing materially differ in the two countries (*x*).

Investment on mortgage of land in Ireland.

The statutory power of investment extends to loans on the security of real securities in Ireland unless forbidden by the trust instrument. But securities of this nature are not authorized by the present rules as regards the investment of cash under control of the Court. The law of Ireland relating to land, although originally the same as that of England, has been modified by various statutory enactments, the effects of which, as regards land tenure, are not generally understood by Englishmen.

Accordingly, the investment of English trust funds on the security of Irish land is not generally to be recommended (*y*).

(*t*) *London and County Banking Co.* v. *Goddard,* (1897) 1 Ch. 642, 650.

(*u*) Paterson's Compendium, sect. 715.

(*x*) See *Re Miles' Will,* 27 Beav. 579.

(*y*) See *Chapman* v. *Browne,* (1902) 1 Ch. 785, C. A.

By the statute 4 & 5 Will. IV. c. 29 (*z*), when trust money was liable to be invested in real securities in England, power was given to trustees to invest in real securities in Ireland unless such investment was expressly forbidden; but, where persons under disability were interested, the sanction of the English Court of Chancery was required to the investment (*a*).

Improvement charges.

A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest, and shall be deemed to have always had power to invest, on any charge or upon mortgage of any charge made under the Improvement of Land Act, 1864 (*b*).

Debentures, &c.

iii.—Statutory Powers of Trustees to invest on Debentures, &c. of Companies.—Mortgages, debentures, and debenture stock of public companies are not, generally speaking, "real securities," inasmuch as the holder has no right to the soil of the lands acquired by the company (*c*).

Trustee Act, 1893, s. 1.

By sect. 1 of the Trustee Act, 1893, the following limited power is given to trustees to invest in securities such as are above referred to:—

> "A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say:—
>
> (g) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament (*d*), and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock (*e*):
>
> (i) In the debenture stock of any railway company in India, the interest on which is paid or guaranteed by the Secretary of State in Council of India:
>
> (l) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the

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(*z*) This statute was virtually superseded by the statutory power to invest on real securities in any part of the United Kingdom given by the Law of Property Amendment Act, 1859, and is now repealed by the Trust Investment Act, 1889, s. 8, and Schedule.

(*a*) *Norris* v. *Wright*, 14 Beav. 291.

(*b*) 56 & 57 Vict. c. 53, s. 5; *post*, p. 532.

(*c*) *Mant* v. *Leith*, 15 Beav. 524; *Mortimore* v. *Mortimore*, 4 De G. & J. 472; *Gardner* v. *London, Chatham and Dover Rail. Co.*, L. R. 2 Ch. 201; *Attree* v. *Hawe*, 9 Ch. D. 337; *Blaker* v. *Herts and Essex Waterworks*, 41 Ch. D. 399; *Re Parker, Wignall* v. *Park*, (1891) 1 Ch. 682.

(*d*) See *Elve* v. *Boyton*, (1891) 1 Ch. 501, C. A.

(*e*) Compare Ord. XXII. r. 17.

supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock."

Debenture stock.

Where trustees are empowered to invest on mortgages or debentures of railways or other companies, they may invest in debenture stock (*f*).

Investment on debentures, &c. of capital moneys arising under Settled Land Acts.

By sect. 21 of the Settled Land Act, 1882 (*g*), capital money arising under the Act may be invested "on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities."

Debentures of local authorities.

A trustee having power to invest in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorizing the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875 (*h*). But this only applies where the trustees have an express power under the instrument creating the trust (*i*).

Costs of investment.

The costs of investment are payable out of the capital and not by the tenant for life (*k*).

Mortgage Debenture Act, 1865.

Trustees having power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest such moneys in or on the security of mortgage debentures issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865 (*l*).

Interests of all the beneficiaries must be considered.

iv.—What kinds of Property form proper Mortgage Investments of Trust Moneys.—Trustees, when investing on mortgage security, as when making any other investment, must not only invest in strict accordance with the terms of their power,

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(*f*) 56 & 57 Vict. c. 53, s. 5 (2); *Re Mackenzie's Trusts*, 23 Ch. D. 750.

(*g*) 45 & 46 Vict. c. 38.

(*h*) 56 & 57 Vict. c. 53, s. 5 (3).

(*i*) *Re Tattersall*, (1906) 2 Ch. 399.

(*k*) *Re Mackenzie's Trusts*, 23 Ch. D. 750; *Re Hanbury's Trusts*, W. N. (1883) 116.

(*l*) 56 & 57 Vict. c. 53, s. 5 (5), replacing 28 & 29 Vict. c. 78, s. 40.

but must hold an even hand between the tenant for life and the remainderman. Applications are frequently made to trustees to change investments, so as to secure a higher rate of interest for the tenant for life; but if they improperly accede to such requests, by investing on a security which, from its speculative character or otherwise, is likely to cause loss to the remainderman, and such loss actually occurs, they will be liable for the consequences, even though the security taken may literally fall within the range of investments permitted by the instrument creating the trust or by statutory enactment (*m*). On the other hand, trustees ought not unduly to favour the remainderman at the expense of the tenant for life. They are bound to preserve the money for those entitled to the *corpus* in remainder, but they are bound to invest it in such a way as will produce a reasonable income for those enjoying the income for the present (*n*).

Mortgage of ground rents.

A power to invest on the security of freehold hereditaments will authorize a loan on a mortgage of freehold ground rents; and in such a case the Court does not look only at the rents, but also at the buildings which are liable for the payment of them (*o*).

Life estate and policy.

Of course a power to invest on real securities does not justify a loan on the security of a life estate in freeholds coupled with a policy of assurance on the life of the borrower (*p*); for the policy which is the main security for the repayment of the principal advanced is merely personal security, depending not only on the regular payment of the premiums, but on the solvency of the society by which the policy is issued.

Turnpike bonds, &c.

The question whether turnpike bonds, debenture bonds issued under special Acts of canal companies, harbour boards and the like, are "real securities" has been raised in numerous cases, and particularly with reference to the provisions of the Mortmain Acts (*q*). The result appears to be that in each case the terms of the special Act authorizing the issue of the securities, and the wording of the particular instrument creating the security, must be looked at to see whether anything in the

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(*m*) *Cockburn* v. *Peel*, 3 De G. F. & J. 170. See *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104, 109; *Stuart* v. *Stuart*, 3 Beav. 430.

(*n*) Per Cotton, L.J., in *Whiteley* v. *Learoyd*, 33 Ch. D. 347, at p. 350.

(*o*) *Vickery* v. *Evans*, 33 Beav. 376; 3 N. R. 286. See *Re Peyton's Settlement Trusts*, L. R. 7 Eq. 463.

(*p*) *Lander* v. *Weston*, 3 Drew. 389; *Fitzgerald* v. *Fitzgerald*, 6 Ir. Ch. R. 145.

(*q*) *Post*, Chap. XXIX., Sect. II.

nature of land is included in the bond, or only the tolls, rents, and profits, as distinguished from, and independent of, the land (*r*).

Renewable leaseholds for lives.

A power to invest trust moneys on "real securities in Ireland" has been held to authorize a loan on the security of leaseholds for lives perpetually renewable at a head-rent, this being a common tenure of land in Ireland (*s*). It is to be observed, however, that the power in that case also expressly authorized investment on leasehold securities. Such tenure is now convertible by statutory grant into an estate in fee simple at a fee farm rent (*t*).

Trade premises.

A power to invest on real securities does not authorize a mortgage on freehold land the value of which depends on fluctuations of trade or business (*u*). In *Re Whiteley, Whiteley* v. *Learoyd* (*x*), the question was raised whether an investment of trust money on a mortgage of a freehold brickfield was within such a power. The Court of Appeal held that the trustees were liable to make good the loss to the estate caused by failure of the security, and this decision was affirmed by the House of Lords (*y*).

Public-house.

So, also, caution should be exercised in lending trust money on mortgage of a public-house, especially if recently opened, where the value of the security depends on the renewal of the licence (*z*).

Unlet houses.

Trustees should not, as a general rule, lend on the security of unlet houses, especially if the mortgagor is a builder (*a*). But in a Scotch case it was said that the mere fact that buildings comprised in a mortgage were unfinished would not be material if due security was taken for their completion (*b*).

Cottage property.

There seems to be no rule that trustees cannot invest on mortgage of cottage property let at weekly rents, but it is obvious

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(*r*) See *Re Christmas, Martin* v. *Bacon*, 33 Ch. D. 332 (where the principal cases are reviewed); *Re David, Buckley* v. *Royal National Lifeboat Institution*, 43 Ch. D. 27; *Hutton* v. *Annan*, (1898) A. C. 289.

(*s*) *Macleod* v. *Annesley*, 16 Beav. 600.

(*t*) See 12 & 13 Vict. c. 105, and 31 & 32 Vict. c. 62.

(*u*) *Stickney* v. *Sewell*, 1 My. & Cr. 8. See *Stretton* v. *Ashmall*, 3 Drew. 9; *Royds* v. *Royds*, 14 Beav. 54.

(*x*) 33 Ch. D. 347.

(*y*) *Sub nom. Learoyd* v. *Whiteley*, 12 App. Ca. 727.

(*z*) *Budge* v. *Gummow*, L. R. 7 Ch. 719.

(*a*) *Hoey* v. *Green*, W. N. (1884) 236. See *Smethurst* v. *Hastings*, 30 Ch. D. 490; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337.

(*b*) Per Lord Herschell in *Rae* v. *Meek*, 14 App. Ca. 558, at p. 571.

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that in most cases such a mortgage would not be a desirable security for trust moneys (*c*).

Copyholds.

Copyholds are a real security, and accordingly an investment upon a mortgage of copyholds is within a power to invest on real securities.

Long leaseholds.

Before the passing of the Trustee Act, 1888 (*d*), trustees authorized by statute or by the terms of the trust instrument to invest on real securities, were not justified in making an advance on the security of a long term of years, such securities not answering to the description of "real securities" (*e*).

Trustee Act, 1893, s. 5.

But by sect. 9 of that Act, such investments were authorized, but *quære* whether the section, which seems to be limited to express powers, extends to sect. 1 so as to authorize an investment on such a security. This section is now repealed, but re-enacted in identical terms by sect. 5 of the Trustee Act, 1893 (*f*), which enacts as follows:—

Enlargement of express powers of investment.

> "A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—
>
> (a) On mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption, or to any condition for re-entry, except for non-payment of rent; and
>
> (b) On any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864."

Leaseholds for short terms.

It may be laid down as a general rule that an investment of trust moneys on a mortgage of leaseholds held for a short time and incumbered with onerous covenants and clauses of forfeiture is, in the absence of express direction in the trust instrument, improper (*g*). There is the further objection to investments on such security that the lessee cannot generally procure production of his lessor's title (*h*).

Personal security.

It is a breach of trust to lend trust money on personal security, unless such a mode of investment is clearly authorized by the

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(*c*) *Re Olive, Olive* v. *Westerman*, 34 Ch. D. 70, 75; *Re Partington*, 57 L. T. 654, 659; *Re Salmon, Priest* v. *Uppleby*, 42 Ch. D. 351, 368; *Re Solomon*, (1912) 1 Ch. 261.

(*d*) 51 & 52 Vict. c. 59.

(*e*) *Re Boyd's Settled Estates*, 14 Ch. D. 626. See *Leigh* v. *Leigh*, 56 L. J. Ch. 125.

(*f*) 56 & 57 Vict. c. 53.

(*g*) *Townend* v. *Townend*, 1 Giff. 201, 211; *Cadogan* v. *Essex*, 2 Drew. 227; *Fuller* v. *Knight*, 6 Beav. 209; *Re Chennell, Jones* v. *Chennell*, 8 Ch. D. 492.

(*h*) *Post*, p. 548.

terms of the trust instrument (*i*). Even an apparently absolute discretion in the trustees will not justify an investment on such security.

So a power to place out at interest "as the trustees should see occasion," was held not to authorize a loan on personal security (*k*). A discretionary power of investment can only be exercised subject to the control of the Court, where the trust is being administered by the Court (*l*).

Where trustees of a settlement authorizing only investments in government or real securities, advanced part of the trust funds to a banking firm on a mortgage of bonds in which the bankers were obligees, the trustees were held liable for the loss caused by failure of the security (*m*).

Meaning of "personal security."

A power to lend on "personal security" may mean either on the security of personal property, or on the security of the borrower's personal undertaking. Where trustees of a marriage settlement, having a power to invest on "real or personal" security, allowed trust money, which had been advanced prior to the marriage, to remain outstanding on the note of hand of the husband, the Court allowed the investment to be continued until further order, on the husband executing to the trustees a bond for the amount of the loan (*n*).

So where the words of a power in a will were "heritable or personal" security, and it appeared that the testator had been used in his lifetime to lend money without security to one of the persons whom he appointed a trustee of his will, Lord Thurlow allowed trust money to remain in the hands of the trustee at interest, without requiring a mortgage to be taken (*o*).

Loan to co-trustee on personal security.

But, as a general rule, it is a breach of trust for trustees who are empowered to lend on personal security to lend to one of themselves on his bond or personal undertaking; such a security depends solely on the solvency of the borrower, with respect to which the settlor must be taken to rely upon the united vigilance of all the trustees (*p*).

(*i*) *Holmes* v. *Dring*, 2 Cox, 1; *Wilkes* v. *Steward*, G. Coop. 6; *Vigross* v. *Binfield*, 3 Madd. 62; *Phillipson* v. *Gatty*, 7 Ha. 516; *Groom* v. *Booth*, 1 Drew. 548; *Styles* v. *Gay*, 1 Man. & Gr. 423.

(*k*) *Pocock* v. *Redington*, 5 Ves. 794.

(*l*) *Bethell* v. *Abraham*, L. R. 17 Eq. 24.

(*m*) *Exp. Geaves*, 8 De G. M. & G. 291.

(*n*) *Pickard* v. *Anderson*, L. R. 13 Eq. 608.

(*o*) *Forbes* v. *Ross*, 2 Bro. C. C. 430.

(*p*) ——— v. *Walker*, 5 Russ. 7. See *Stickney* v. *Sewell*, 1 My. & Cr.

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Loan to tenant for life.

But such a power will authorize a loan of trust moneys to a tenant for life, whose consent is required to investments, provided he is a person to whom such an advance might otherwise be prudently made (q).

But if the power expressly authorizes a loan to a trustee on personal security, the co-trustee will not be liable for loss of the money advanced, in the absence of proof of misconduct on his part contributing to the loss (r).

Loans to co-trustee generally improper.

No reported case seems to go so far as to decide that a loan by trustees to one of themselves, if otherwise proper at the time of taking the security, as regards the nature and value of the mortgaged property, and in all other respects, and in the absence of subsequent misconduct or want of care on the part of the trustees, constitutes such a breach of trust as will of itself render the other trustees liable for loss to the trust fund through failure of the security and insolvency of the debtor. But it is obvious that a loan to a co-trustee is objectionable and improper, inasmuch as the beneficiaries are entitled to have the unbiassed judgment of all the trustees as to the expediency of the proposed security; and such a loan places the borrowing trustee in a position in which his interest is liable to conflict with his duty, and tends to put difficulties in the way of the proper exercise by the other trustees of their rights and remedies as mortgagees; moreover, it may happen that, by the death or the retirement of the other trustees, the borrowing trustee may be left in the inconsistent character of mortgagor and sole mortgagee. The Court would certainly regard such a loan with the utmost jealousy (s).

Loan to solicitor.

Where an unauthorized loan of a trust fund was made to a solicitor, he was ordered to refund it, though he was not solicitor to the trust nor party to the action (t).

Accommodation loan.

A power to lend on personal security will not extend to an accommodation loan (u).

Loan to firm.

Where a testator by his will authorizes his trustees to lend

(where a mortgage was taken of property of inadequate value); Francis v. Francis, 5 De G. M. & G. 108 (where trustees advanced money to a co-trustee on mortgages of terms of years); *Westover* v. *Chapman*, 1 Coll. 177.

(q) *Re Laing, L.* v. *Radcliffe*, (1899) 1 Ch. 593. But see *Lamb* v. *Lane*, Ir. R. 3 Eq. 1.

(r) [illegible] v. [illegible], 7 De G. M. & G. [illegible].

(s) [illegible] v. [illegible], 5 Ves. at p. 799.

(t) *Re Carroll*, (1902) 2 Ch. 175.

(u) *Langston* v. *Ollivant*, G. Coop. 33.

a sum of money on personal security, to a particular firm, it is a breach of trust to continue the loan after a change takes place in the members of the firm (*x*).

Rule where trust is administered by Court.

Where a trust instrument authorizes investments on personal security, and the trust is being administered by the Court, it would seem that, though existing investments on such security may be allowed to remain, future investments will be confined to such stocks, funds, and securities as are authorized for investment of cash under the control of the Court (*y*).

Mortgages of undivided shares and reversions.

There seems to be no rule against lending trust money on the security of an undivided share or of a reversionary interest: but in the latter case, care should be taken to ascertain the present value of the reversion, and not to lend more than the proper proportion of such value (*z*).

Disadvantages of such securities.

It is obvious that a power of sale is essential as a means of rendering such securities available. Lending on the security of an undivided share is open to the objection that it may lead to difficulties arising from the complication of the rights and interests of other persons with those of the lender. And with regard to a reversion, it must be borne in mind that such an interest does not, till it falls into possession, yield any income, so that the mortgagee must in the interim rely entirely on the mortgagor's covenant for payment of his interest.

Trustees should acquire legal estate in mortgaged property.

v.—**Precautions to be observed on Advancing Trust Moneys on Mortgage.**—Trustees lending on mortgage should be careful to acquire the legal estate in the mortgaged property (*a*). They are not justified in allowing trust funds to be secured upon an equitable deposit of deeds with or without an undertaking to execute a legal mortgage (*b*).

Copyholds to be surrendered.

If an advance is made on the security of copyholds, trustees should not be content with a mere covenant to surrender, but should see that a surrender is actually made, thus entitling them to be admitted whenever admittance may seem necessary or expedient (*c*).

(*x*) *Re Tucker, Tucker* v. *Tucker* (No. 2), (1894) 3 Ch. 429, C. A.

(*y*) *Holmes* v. *Moore*, 2 Moll. 328.

(*z*) See *Re Turner, Barker* v. *Ivimey*, (1897) 1 Ch. 536.

(*a*) *Norris* v. *Wright*, 14 Beav. 308. See *Webb* v. *Jonas*, 39 Ch. D. 660.

(*b*) *Webb* v. *Ledsam*, 1 K. & J. 385; *Swaffield* v. *Nelson*, W. N. (1876) 255.

(*c*) See *Wyatt* v. *Sherratt*, 3 Beav. 498.

Second mortgages.

Investment upon a second mortgage is a breach of trust (*d*), not only because the legal estate is not acquired, but also because the trustees will not be entitled to the title deeds and will be exposed to the risk of foreclosure or of a forced sale by the first mortgagee, to redeem whom no funds may be available. Second mortgagees are also exposed to the risk of tacking (*e*). Such an investment does not, however, appear to be in itself a breach of trust in Ireland (*f*).

Trustees may lend on mortgage subject to improvement charges,

A trustee having power to invest on mortgage may invest on mortgage of any land notwithstanding the same is charged with a rent under the Drainage Acts or under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be taken in mortgage is not to be subject to any such prior charge (*g*).

—or charges under Copyhold Act.

Charges under the Copyhold Act (*h*) having priority over existing incumbrances do not render it necessary for trustees to call in moneys already invested or previously charged.

Sub-mortgages.

A sub-mortgage is apparently a proper security for trust moneys, provided the trustees obtain the legal estate and are put into a position to exercise the powers arising under the original mortgage; they thus get the benefit of two several covenants for payment of the money (*i*).

Contributory mortgages.

Trustees are not justified, unless expressly authorized by the trust investment, in lending on a contributory mortgage, by taking a mortgage either in the names of themselves and other joint mortgagees, or in the name of a common trustee on behalf of all the mortgagees: both courses would result in the legal estate being vested not in the trustees alone, but either in them jointly with others or in a stranger, as the case might be; and might seriously hamper them in dealing with the security by sale or otherwise for the benefit of their *cestuis que trust*; and the latter course would violate the rule that trusts must not be delegated (*k*).

A trustee who invests on a contributory mortgage, even

(*d*) *Robinson* v. *Robinson*, 16 Jur. 256; *Drosier* v. *Brereton*, 15 Beav. 222; *Fowler* v. *Reynal*, 3 Mac. & G. 500; *Lockhart* v. *Reilly*, 1 De G. & J. 476; *Re Newland*, W. N. (1904) 181.

(*e*) See as to tacking, *post*, Chap. LV. Sect. II.

(*f*) *Chapman* v. *Browne*, (1902) 1 Ch. 785, C. A.

(*g*) 56 & 57 Vict. c. 53, s. 6, replacing 27 & 28 Vict. c. 114, s. 61.

(*h*) 57 & 58 Vict. c. 46.

(*i*) *Smethurst* v. *Hastings*, 30 Ch. D. 490.

(*k*) *Webb* v. *Jonas*, 39 Ch. D. 660. See *Re Massingberd's Settlement*, 63 L. T. 296.

under the advice of his solicitor, does not act "reasonably," and ought not to be excused under the Judicial Trustees Act, 1896, s. 3 (*l*).

Where trustees lent money on a contributory mortgage, on the advice of their solicitors, who also advanced part of the mortgage money, and there were no unusual provisions in the mortgage deed, it was held that the solicitors might possibly be answerable in damages to their clients, but that the trustees were not entitled to priority as against the assignees of the solicitors (*m*).

Blending appropriated security with other trust funds.

Where trustees have appropriated a specific security to answer a trust legacy, they are not justified in realizing that security and blending the proceeds with other trust funds by investing them on mortgages to answer the legacy and also the interests of other *cestuis que trust* (*n*).

Mixing trust funds.

If a trustee mixes up trust funds with his own money so that the two cannot be accurately distinguished, he will be charged with the whole, except what he can prove to be his own (*o*).

Proviso that principal shall not be called in for a specified time.

In the case of a sale by trustees where, as is often advisable, part of the purchase-money is allowed to remain on mortgage, the trustees should be careful to take a legal mortgage for the money remaining unpaid; but they must not, unless expressly authorized so to do, bind themselves not to call in the mortgage before a specified time, for if the particular interest should determine before the period expires, the remainderman, if absolutely entitled, may call upon the trustees at once to pay over the principal (*p*).

Power of sale.

Trustees should not, as a rule, lend on mortgage without acquiring a power of sale in case of default. Such powers were, till recently, inserted generally in mortgages, and are now impliedly imported into every mortgage deed unless expressly excluded (*q*).

Powers of sale, however, were not usually inserted in, and might now have to be excluded from, mortgages of long terms of years created by settlement or will for the purpose of raising portions, &c., which, in other respects, offer peculiar

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(*l*) *Re Dive, Dive* v. *Roebuck*, (1909) 1 Ch. 328.

(*m*) *Stokes* v. *Prance*, (1898) 1 Ch. 212.

(*n*) *Re Walker, Walker* v. *Walker*, 59 L. J. Ch. 306.

(*o*) *Lupton* v. *White*, 15 Ves. 432; *Cook* v. *Addison*, L. R. 7 Eq. 466.

(*p*) *Vickery* v. *Evans*, 33 Beav. 376. See also *Mant* v. *Leith*, 15 Beav. 524, 527.

(*q*) 44 & 45 Vict. c. 41, s. 19.

advantages for investment of trust moneys as usually offering ample security in point of value and as not being likely to be paid off (*r*). It has been held that it is not necessarily a breach of trust for a trustee to take a mortgage without a power of sale (*s*); and this decision might possibly be followed in the case of a mortgage of a portions term, though the statutory power of sale was excluded.

Stock mortgage.

A loan of the proceeds on mortgage, with a covenant by the mortgagor to replace a specified amount of stock instead of repaying the cash advanced, is not a proper form of investment of trust moneys (*t*).

Completion of security before the money is paid.

Trustees lending on mortgage should not part with the money without being satisfied that the security has been executed and delivered over by the mortgagor. If trustees, instead of seeing themselves to the investment and the completion of the security, delegate that duty to their solicitor or agent, who misapplies the money, they will be liable to make good the loss to the trust estate (*u*).

Loss of trust moneys through fraud of broker.

Trustees investing in debentures or debenture stock of municipal corporations bought on the Stock Exchange may pay the money to the broker before receipt of the debentures or stock, and are not liable if he absconds with the money; but apparently the trustees would be liable, if they so parted with the money, knowing that the contract for a loan is to be made directly with the corporation (*x*).

Title deeds to be handed over.

On completion of the security, trustees should be careful to see that not only the mortgage deed, but all the documents of title relating to the mortgaged property, are handed over to them (*y*).

Duties on land values.

In addition to the above precautions, an intending mortgagee will now have to take into consideration the provisions of the Finance Act, 1910 (*z*). He will have to remember (1) that on a sale by him increment value duty may become

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(*r*) Vaizey on Settlements, p. 455.

(*s*) *Farrar* v. *Barraclough*, 2 Sm. & G. 231; but see *Lockhart* v. *Reilly*, 1 De G. & J. 464.

(*t*) *Whitney* v. *Smith*, L. R. 4 Ch. 513. See *Pell* v. *De Winton*, 2 De G. & J. 18; *Bromley* v. *Kelly*, 39 L. J. Ch. 274; *ante*, p. 41.

(*u*) *Rowland* v. *Witherden*, 3 Mac. & G. 568; *Hanbury* v. *Kirkbrand*, 3 Sim. 265. See *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16; *Bostock* v. *Floyer*, L. R. 1 Eq. 26.

(*x*) *Speight* v. *Gaunt*, 9 App. Ca. 1.

(*y*) *Rowland* v. *Witherden*, *sup.*; *Thompson* v. *Finch*, 8 De G. M. & G. 560; *Re Dewar*, *Dewar* v. *Brooker*, 54 L. J. Ch. 830.

(*z*) 10 Edw. VII. c. 8, ss. 2, 13, 16, 20.

payable by him; (2) that a mortgagee of ground rents or of land which is or may become subject to a lease for a term exceeding twenty-one years may have to pay reversion duty; (3) that the value of undeveloped land may be diminished by undeveloped land duty, and (4) that where the land comprises minerals, mineral rights duty may become payable.

A second mortgagee should remember that if he sells he may have to pay increment value duty even if the whole of the purchase money has to be paid to the first mortgagee, and that if the first mortgagee sells he may have to wait for his money until the duty is assessed.

A mortgagee who is liable to pay increment value duty or reversion duty may add the amount to his security, together with costs and expenses properly incurred by him in respect of the payment of the duty (*a*).

Inquiry into value and title.

vi.—Valuation of the Property.—Trustees, when investing on mortgage security, must be careful to exercise proper discretion and caution in the choice of a particular security by satisfying themselves as to the sufficiency of the property in point of value, and by strictly investigating the title of the intending mortgagor. The burden of proof that the security is good lies upon the trustee (*b*); and he should therefore be careful to preserve evidence of the propriety of the transaction.

The "two-thirds rule" as to value.

According to what was long the general understanding of the legal profession and the practice of the Court, a trustee was held to be justified in advancing money on property of permanent value (as freehold agricultural land) to the extent of two-thirds of the value of the property (*c*), but not more than half of the value if the property consisted of houses or buildings (*d*); and much less if of buildings depending for their value on the trade carried on there (*e*). But there is no fixed

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(*a*) *Ibid.* s. 39 (4).

(*b*) *Stickney* v. *Sewell*, 1 My. & Cr. 8, 13; *Stretton* v. *Ashmall*, 3 Drew. 12.

(*c*) *Stickney* v. *Sewell, sup.*; *Macleod* v. *Annesley*, 16 Beav. 600.; *Ingle* v. *Partridge* (No. 2), 34 Beav. 411; *Roddy* v. *Williams*, 3 J. & L. 16; *Smethurst* v. *Hastings*, 30 Ch. D. 490, 498; *Learoyd* v. *Whiteley*, 12 App. Ca. 727, 733.

(*d*) *Norris* v. *Wright*, 14 Beav. 291; *Stretton* v. *Ashmall*, 3 Drew. 9; *Macleod* v. *Annesley*, 16 Beav. 600; *Budge* v. *Gummow*, L. R. 7 Ch. 719; *Hoey* v. *Green*, W. N. (1884) 236; *Fry* v. *Tapson*, 28 Ch. D. 268.

(*e*) *Stickney* v. *Sewell*, 1 My. & Cr. 8; *Stratton* v. *Ashmall, sup.*; *Royds* v. *Royds*, 14 Beav. 54; *Budge* v. *Gummow, sup.*; *Learoyd* v. *Whiteley*, 12 App. Ca. at p. 733.

rule that trustees must not lend more than half on trade premises (*f*).

The "two-thirds rule," however, was not enforced with exact strictness (*g*); in applying the rule, the circumstances of the particular case might be taken into consideration, and where trustees lent on property of less value and acted honestly, they were protected by the Court and allowed their costs (*h*); but a trustee who disregards the rule takes upon himself great risk (*i*).

Statutory proportion of value.

The Trustee Act, 1888 (*k*), sect. 4, relieved trustees from liability in respect of the proportion borne by the amount of the loan to the value of the property, provided they acted upon the report and under the advice of a surveyor or valuer, as prescribed by the Act, and that the amount of the loan did not exceed two-thirds of the value of the property as stated in the report, whether the property was agricultural, or house, or other property on which the trustee might lawfully lend.

This enactment is repealed, but virtually re-enacted by the Trustee Act, 1893 (*l*), which enacts as follows:—

Loans and investments by trustees not chargeable as breaches of trust.

Sect. 8. "(1.) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report."

The section is really a relieving section and not one which imposes further obligations on trustees (*m*).

(*f*) *Palmer* v. *Emerson*, (1911) 1 Ch. 758.

(*g*) *Re Godfrey*, *Godfrey* v. *Faulkner*, 23 Ch. D. 483.

(*h*) *Re Olive*, *Olive* v. *Westerman*, 34 Ch. D. at p. 73. See *Re Pearson*, 51 L. T. 692.

(*i*) *Re Salmon*, *Priest* v. *Uppleby*, 42 Ch. D. 351, at pp. 369, 370.

(*k*) 51 & 52 Vict. c. 59. The Act applied as well to trusts created by instrument executed before as to trusts created after the passing of the Act. See sect. 12.

(*l*) 56 & 57 Vict. c. 53. This enactment is retrospective, except where an action or proceeding was pending on the 24th of December, 1888. See sect. 8 (4).

(*m*) *Palmer* v. *Emerson*, (1911) 1 Ch. 758, per Eve, J.

The requirements of this enactment, so as to entitle trustees to the protection thereby offered, seem to be as follows:—

Effect of enactment.

Qualification of valuer.

First, trustees intending to lend money on mortgage must cause a report as to the value of the property to be made by a person whom they reasonably believe to be an able practical surveyor or valuer. The Act of 1888 abrogated the former rule that the person employed as a valuer must be one having local knowledge of the district where the property forming the proposed security was situated (*n*); and the rule is now no longer in force under the present Act.

Choice of valuer.

Secondly, the person appointed by the trustees to value the property must be appointed on their behalf, and must be one whom they personally have reason to believe to be an able practical surveyor or valuer (*o*). The trustees should not leave the choice of the valuer to their solicitor, for it is no part of a solicitor's business to recommend a valuer (*p*).

Valuer must be independent of mortgagor.

Thirdly, trustees cannot safely, under any circumstances, lend on a valuation made for the mortgagor (*q*); or employ a valuer who is in the employment of, or recommended by, the intending mortgagor (*r*). The trustees should not do anything which might cause the valuer to be influenced by the mortgagor, as by introducing the valuer to the mortgagor for the purpose of negotiating as to remuneration (*s*). The valuer's fee should be paid in the first instance by the trustees, and should be repaid to them by the mortgagor. The amount of the fee should not be made to depend upon the completion of the mortgage (*t*). The practice of making the fee depend upon the mortgage going through is most reprehensible; it may get trustees into difficulties, and a certificate by a surveyor under such circumstances might not be accepted by the Court under the Trustee Act, 1893 (*u*).

Valuer must be informed of purpose for which report is required.

Fourthly, the valuer must be "instructed" by the trustees, and they should accordingly inform the valuer that they are lending trust moneys, and that they do not desire to lend more

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(*n*) See as to this rule, *Budge* v. *Gummow*, L. R. 7 Ch. 719; *Fry* v. *Tapson*, 28 Ch. D. 268.

(*o*) *Re Walker, Walker* v. *Walker* (No. 1), 59 L. J. Ch. 386.

(*p*) *Fry* v. *Tapson*, *sup.*

(*q*) *Walcott* v. *Lyons*, 54 L. T. 786.

(*r*) *Norris* v. *Wright*, 14 Beav. 307; *Hopgood* v. *Parkin*, L. R. 11 Eq. 74; *Re Stuart, Smith* v. *Stuart*, (1897) 2 Ch. 583.

(*s*) *Re Partington, Partington* v. *Allen*, 57 L. T. 654.

(*t*) *Smith* v. *Stoneham*, W. N. (1886) 178.

(*u*) *Marquis of Salisbury* v. *Keymer*, W. N. (1909) 31.

than the proper proportion of the actual value of the property, and they should ask for a valuation which will enable them to judge whether they are justified in lending the amount they propose to lend (*x*). A valuation made for another purpose, especially if comprising other property, would be clearly insufficient to protect the trustees (*y*). The Act requires that, in order that the trustees may obtain the statutory protection, the advance shall be made "under the advice of the surveyor or valuer expressed in the report"; it is obvious that the surveyor or valuer cannot properly be asked to give such advice, unless he is informed of the fact that it is proposed to make the advance out of trust moneys; it is therefore advisable, though not expressly required by the Act, that a statement that the surveyor or valuer was informed of this fact should appear on the face of the report.

Advice of valuer as to amount to be advanced.

Fifthly, the distinction formerly made as to what was a proper advance, according as the property was agricultural land, house property, or otherwise, is now done away with, and a uniform proportion of advance to value is laid down which must not be exceeded in any case. The report should therefore state the estimated value of the property forming the proposed security, and should expressly advise as to the amount which may be safely advanced upon the security, such amount not to exceed in any case two-thirds of the value of the property as stated in the report (*z*). But it is not the law that when once a valuer has ascertained the value, whatever method of valuation he has adopted, a trustee is *primâ facie* justified in making an advance of two-thirds of the value (*a*). If the property is liable to deterioration a prudent man must require a larger margin than two-thirds (*b*). Trustees are not justified in lending more than two-thirds even though they have obtained a report stating the estimated value of the property, and advising that the trustees might lend a larger proportion than two-thirds (*c*). It is not enough for the valuer to state the amount for which he considers the property to be good security, but he must state the value of the property (*d*).

(*x*) *Re Olive, Olive* v. *Westerman*, 34 Ch. D. 70, at p. 73.

(*y*) *Re Walker*, 62 L. T. 449.

(*z*) *Re Somerset, inf.*; but see *Re Solomon*, (1912) 1 Ch. 261.

(*a*) *Shaw* v. *Cates*, (1909) 1 Ch. 389.

(*b*) *Ibid.*

(*c*) *Re Somerset*, (1894) 1 Ch. 231, C. A.; *Re Solomon, sup.*

(*d*) *Re Stuart, Smith* v. *Stuart*, (1897) 2 Ch. 583.

Liability of valuer for misleading report.

If a valuer is appointed and paid by trustees, and is informed of the purpose for which his valuation is required (*e*), but not otherwise (*f*), he will be held liable for reckless statements inducing a loan on a security which proves deficient.

Neglect of solicitor to procure proper valuation.

A client lending on mortgage by the advice of his solicitor, has a right of action against him for neglecting to procure an independent valuation (*g*); but in the case of a trust investment this is the right only of the trustees, not of the beneficiaries (*h*).

Trustee must not be valuer.

Trustees must not appoint one of themselves to make a valuation of a proposed mortgage security (*i*).

All the trustees must satisfy themselves as to the sufficiency of the security (*k*).

Depreciation in value of mortgaged property.

Where trustees, acting upon the advice of competent persons, and in the *bonâ fide* exercise of their discretion as prudent men of business, advance trust money on the security of property, the cases seem to show that they will not be held liable for subsequent depreciation of the value of the property (*l*). And now, by the Trustee Act, 1893, Amendment Act, 1894 (*m*), "A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law." But this enactment is not retrospective (*n*).

Duty of trustees in such cases.

When property, on the security of which trust money has been advanced, falls in value, so that the mortgage debt comes to exceed two-thirds of the actual value of the property, it is not absolutely their duty at once to call in the mortgage (*o*); they should, as a general rule, require the mortgagor to reduce the amount due upon the mortgage, or to give additional security for the total sum advanced; and they may insist on calling in so much of the debt as is not covered by the security, though the tenant for life refuses the consent to change of investments required by the instrument creating the trust (*p*). But they

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(*e*) *Cann* v. *Wilson*, 39 Ch. D. 39; *Scholes* v. *Brook*, W. N. (1891) 101.

(*f*) *Le Lievre and Dennes* v. *Gould*, (1893) 1 Q. B. 491.

(*g*) *Wood* v. *Jones*, 61 L. T. 551.

(*h*) *Rae* v. *Meek*, 14 App. Ca. 558.

(*i*) *Peters* v. *Lewes and East Grinstead Rail. Co.*, 18 Ch. D. 429, at p. 439 (a case of a sale under the Lands Clauses Act).

(*k*) *Griffiths* v. *Porter*, 25 Beav. 236.

(*l*) *Learoyd* v. *Whiteley*, 12 App. Ca. 727. See *Budge* v. *Gummow*, L. R. 7 Ch. 719; *Re Olive*, *Olive* v. *Westerman*, 34 Ch. D. 70.

(*m*) 57 Vict. c. 10, s. 4.

(*n*) *Re Chapman*, *Cocks* v. *Chapman*, (1896) 1 Ch. 323, reversed on other points, (1896) 2 Ch. 763, C. A.

(*o*) *Ibid.*

(*p*) *Harrison* v. *Thexton*, 4 Jur N. S. 550. See *Thornton* v. *Hawley*, 10 Ves. 129, 137.

have a discretion in the matter which they must exercise as prudent practical men with due regard to all the circumstances of the case, such as the solvency of the mortgagor, and the risk of the property being thrown on the hands of the trustees; in such a case the trustees may, by summons under Ord. LV. rule 3 (g), without asking for administration, obtain the directions of the Court as to what they ought to do as to calling in the mortgage (*q*).

Advances for maintenance of inadequate security.

It would seem that where trust money has been invested on mortgage of property, which becomes depreciated in value, the trustees are justified in their discretion in making such further advances out of the trust funds as may be necessary for maintaining or improving the mortgaged property, so as to secure the total amount advanced, and that they will not be liable if the result should disappoint their expectations; but the burden of proof lies on the trustees to show that they exercised due caution and judgment (*r*).

Periodic inspection.

The duty of trustees with respect to periodic inspections of mortgaged properties has never been the subject of judicial decision (*s*). But it seems that there is no duty or obligation on them to make periodical inspections or investigations as to the sufficiency of the security or the solvency of the mortgagor. If, however, there are circumstances which suggest that the security is in jeopardy the duty may arise. The liability of a trustee in dealing with an authorised security must proceed on the footing of wilful default and not upon not making inquiries (*t*).

Trustees should not call in good mortgage.

Trustees are not justified in calling in money invested on good and sufficient mortgage security, unless there are reasonable grounds for apprehending that it will fall in value, or unless the money is required for the purposes of the trust, or unless the calling in of the mortgage is for the benefit of all persons interested (*u*).

Right of trustees to indemnity.

A trustee is bound to call in money outstanding on personal

(*q*) *Re Medland, Eland* v. *Medland*, 41 Ch. D. 476.

(*r*) *Collinson* v. *Lister*, 20 Beav. 356, affirmed on other points, 7 De G. M. & G. 634. See *Vyse* v. *Foster*, L. R. 7 H. L. 318; *Jesse* v. *Lloyd*, W. N. (1883) 88; 48 L. T. 656.

(*s*) *Shaw* v. *Cates*, (1909) 1 Ch. 389, per Parker, J.

(*t*) *Rawsthorne* v. *Rowley*, (1909) 1 Ch. 409, n.

(*u*) *Howe* v. *Lord Dartmouth*, 7 Ves. 150; *Orr* v. *Newton*, 2 Cox, 277; *Ames* v. *Parkinson*, 7 Beav. 379, 383; *Robinson* v. *Robinson*, 1 De G. M. & G. 247, 263; *ante*, p. 525.

security when called upon to do so by his *cestuis que trust*, without requiring any indemnity from them (*x*). Generally, however, trustees are not bound to take proceedings at their own expense, and without an indemnity from their *cestuis que trust*, to recover trust property (*y*). In such a case, if the trustees refuse to sue, the *cestuis que trust* may obtain leave to sue in the names of the trustees (*z*).

Apportionment of deficient fund from sale under a mortgage.

Where a tenant for life and remaindermen are entitled to an outstanding mortgage debt and arrears of interest, and the security realizes less than sufficient to pay the principal and interest in full, the sum realized by the security ought to be apportioned between the tenant for life and remaindermen in the proportion which the amount due for arrears of interest bears to the amount due in respect of the capital debt (*a*). If the security is not realized the rents are applicable first in discharge of arrears of interest due to the estate, next in payment to the tenant for life of sums not exceeding the mortgage interest, and lastly as capital (*b*).

Extent of the statutory protection.

It is to be observed that the protection afforded by the Act of 1893 (like the repealed Act of 1888) does not absolutely free from liability trustees lending money upon the security of property, provided they comply with the statutory requirements, but only enacts that they shall not be "chargeable with a breach of trust by reason *only* of the proportion borne by the amount of the loan to the value of such property at the time the loan was made." The statute will not protect trustees from liability if the security is "one of a class which is attended with hazard" (*c*). The protection of the statute, provided its requirements are complied with, would appear to be complete; but the security must be, in other respects, one upon which trustees would have been justified in advancing money according to the principles of law hitherto recognized.

Liability for loss by reason of improper investments.

With regard to the liability of a trustee who advances more than the proper proportion, having regard to the value of the

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(*x*) *Kirby* v. *Mash*, 3 Y. & C. Ex. 295.

(*y*) *Annesley* v. *Simeon*, 4 Madd. 390; *Tredball* v. *Medlicott*, 36 W. R. 886.

(*z*) *Fletcher* v. *Fletcher*, 4 Ha. 67.

(*a*) *Stewart* v. *Kingsale*, (1902) 1 Ir. R. 496; *Re Atkinson*, (1904) 2 Ch. 160; and see *Re Broadwood*, (1908) 1 Ch. 115.

(*b*) *Re Coaks*, (1911) 1 Ch. 171.

(*c*) Per Stirling, J., in *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, at p. 354. See *Re Salmon, Priest* v. *Uppleby*, 42 Ch. D. 351; *Re Turner, Barker* v. *Ivimey*, (1897) 1 Ch. 536.

property, the Trustee Act, 1893, s. 9 (re-enacting sect. 5 of the repealed Act of 1888), enacts as follows:—

"(1.) Where a trustee improperly advances trust money on a mortgage security, which would, at the time of the investment, be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorized investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

"(2.) This section applies to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto, on the 24th day of December, 1888."

In applying this section the Court will be guided by the principles which obtained before the Act of 1888 as to the margin of value to be required (*d*).

A trustee will not be protected by this section from liability for breach of trust, unless the investment was proper in all respects, except as regards value, at the time when the money was advanced (*e*).

Liability of retiring trustee.

A retiring trustee does not, by transferring to new trustees a mortgage on which he has lent a larger sum than was justifiable, free himself from liability to be sued by the *cestui que trust* for any loss arising on a sale by the new trustees under their power as mortgagees, if fairly conducted; for the sale is under the power which the retiring trustee himself has given to the new trustees, by transferring the mortgage to them (*f*).

Title.

vii.—Investigation of Title to the Property.—The Trustee Act, 1893, s. 8 (3), re-enacting the provisions of the Trustee Act, 1888, s. 3 (3), which are repeated for the purpose of consolidation, enacts as follows:—

Acceptance of short title.

"A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property, he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if, in the opinion of

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(*d*) *Shaw* v. *Cates*, (1909) 1 Ch. 389.

(*e*) *Re Walker, Walker* v. *Walker*, 59 L. J. Ch. 386; *Re Turner, Barker* v. *Ivimey*, (1897) 1 Ch. 536.

(*f*) *Re Salmon, Priest* v. *Uppleby*, 42 Ch. D. 351, 371, C. A. See *Head* v. *Gould*, (1898) 2 Ch. 250.

the Court, the title accepted be such as a person acting with prudence and caution would have accepted."

Formerly, trustees lending on mortgage could not with safety dispense with requiring a title going back not less than forty years (*g*). Even now they may only accept a shorter title if they act with due prudence and caution, a matter which depends on the circumstances of each particular case. It is conceived that they should not accept a title commencing at a recent date, unless the property belongs to, or has lately been acquired from, persons of assured position.

Investigation of title.

In every case the title should be carefully investigated, otherwise the trustees will be responsible if, through a defect in title, the security fails wholly or in part (*h*). The investigation of title is, however, within the ordinary scope of a solicitor's business, and it would seem clear that if a trustee acting *bonâ fide* under his solicitor's advice accepts a defective title, he will be protected (*i*).

Duty of solicitor to trustees.

It is clearly necessary and proper for trustees, when proposing to invest trust money on mortgage security, for the protection both of themselves and their beneficiaries, to consult a solicitor with regard to the sufficiency in value and soundness of title of the property intended to be comprised in the security. The rule is thus stated by Stirling, J. (*k*):—"A trustee cannot delegate the execution of the trust. All that he is entitled to do is to avail himself of the services of others wherever such employment is according to the usual course of business (*l*). It is, therefore, the duty of a solicitor not so much himself to form or express an opinion on the value of the property offered to a trustee as security for an advance (though the law does not prevent him from so doing if he thinks fit), as to see that the trustee has before him the proper materials for forming a judgment of his own. He ought, therefore, to see not only that the trustee has before him proper valuations of the property, but that he is made acquainted with any facts known to the solicitor, and not appearing by the valuations, which may affect the value

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(*g*) *Exp. Governors of Christ's Hospital*, 2 H. & M. 166.

(*h*) *Lockhart* v. *Reilly*, 1 De G. & J. 464.

(*i*) See per Lindley, L.J., in *Speight* v. *Gaunt*, 22 Ch. D. at p. 761; and per Cotton, L.J., in *Re Whiteley, Whiteley* v. *Learoyd*, 33 Ch. D. at p. 350.

(*k*) *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, at p. 360.

(*l*) See *Learoyd* v. *Whiteley*, 12 App. Ca. at p. 734.

of the property, and that his attention is directed to any rules laid down by the Courts for the guidance of trustees with reference to such matters."

Employment of solicitor who acts for mortgagor.

In investing trust moneys on mortgage, it is not unusual for trustees to employ the solicitor who acts for the mortgagor. This practice is, however, open to objection, both because of the inconvenience which may arise from the doctrine of implied notice, and because there is, in such a case, such a conflict of duties on the part of the solicitor that he cannot adequately represent the interests of both lender and borrower (*m*). A solicitor who acts for both parties must not disclose to the proposed mortgagee any defect which he may find in the borrower's title (*n*), though no doubt he would be justified, and indeed bound, to advise the mortgagee not to make the advance. It has been said that to employ the mortgagor's solicitor, though not absolutely amounting to a breach of trust, requires the trustee who does so to take additional precautions; and, in the case referred to, the trustee was held liable for the fraud of the solicitor (*o*).

Waiving defect in title.

Trustees will be held liable for loss to the estate if they waive any material defect in the mortgagor's title (*p*).

Fresh investigation on further advance.

If a further advance is made upon the security of property comprised in the security for the original loan, the subsequent title should be produced and investigated, so as to ascertain that there have been no intermediate dealings with the property, which might rank in priority to the further advance on the ground of implied notice (*q*).

Lessor's title.

By sect. 8 (2) of the Trustee Act, 1893, re-enacting sect. 3 (2) of the Trustee Act, 1888 (which is repealed), it is enacted:—

> "A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed wholly or partly with the production or investigation of the lessor's title."

Before the passing of the Act of 1888, trustees lending on leasehold security were bound to see that they acquired a marketable title, and accordingly could not waive their right to

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(*m*) *Waring* v. *Waring*, 3 Ir. Ch. R. 331, 336; *Crampton* v. *Walker*, 31 L. R. Ir. 437. See *Re Stuart, Smith* v. *Stuart*, (1897) 2 Ch. 583.

(*n*) *Taylor* v. *Blacklow*, 3 Bing. N. C. 235.

(*o*) *Sutton* v. *Wilders*, L. R. 12 Eq. 373, at p. 377. See *Fyler* v. *Fyler*, 3 Beav. 550.

(*p*) *Eastern Counties Rail. Co.* v. *Hawkes*, 5 H. L. C. 331, 363.

(*q*) *Hopgood* v. *Parkin*, L. R. 11 Eq. 74.

production of the lessor's title. Even now it would not be prudent for trustees to lend money on the security of a recently-granted lease, unless the title to the freehold is well known, or unless the title thereto is produced (*r*).

Jurisdiction of Court in cases of breach of trust.

viii.—General Protection of Trustees.—The Judicial Trustees Act, 1896 (*s*), enacts as follows:—

> Sect. 3. "(1) If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee, either wholly or partly, from personal liability for the same.
>
> "(2) This section shall come into operation at the passing of this Act."

The Court refused to grant relief under the Act where trustees invested a larger sum than they were justified in doing (*t*), where they invested on a contributory mortgage (*u*), where they invested on a puisne mortgage in Ireland (*x*), or without a sufficient or independent valuation (*y*). But relief was granted where more than a half was lent on trade premises and on an old valuation (*z*).

Notice of trust to be avoided.

ix.—Forms of Mortgages to Trustees and of Transfers thereof.—If a mortgagor paid off a mortgage debt, having notice that it was trust money, it was a settled rule of equity that he was bound in equity to see to its application, unless he was expressly or impliedly exempted from that obligation; but inasmuch as all trustees have now a statutory power to give receipts for funds belonging to them as such, so as to exonerate the person paying the same from seeing to the application thereof (*a*), the obligation referred to cannot now arise.

(*r*) See 42 Ch. D. at p. 367.

(*s*) 59 & 60 Vict. c. 35. See *Re Turner, Barker* v. *Ivimey*, (1897) 1 Ch. 536; *Chapman* v. *Browne*, (1902) 1 Ch. 785.

(*t*) *Re Turner*, (1897) 1 Ch. 536.

(*u*) *Re Dive*, (1909) 1 Ch. 328.

(*x*) *Chapman* v. *Browne*, (1902) 1 Ch. 785.

(*y*) *Re Stuart*, (1897) 2 Ch. 583; *Shaw* v. *Cates*, (1909) 1 Ch. 389.

(*z*) *Palmer* v. *Emerson*, (1911) 1 Ch. 758.

(*a*) 56 & 57 Vict. c. 53, s. 20; see *ante*, p. 426.

Even so, however, a difficulty still occurs from the necessity of producing the settlement or will creating the trust to prove the fact, and of engrafting the proof on the title, to satisfy an assignee of the mortgage, as well as future purchasers. To obviate this latter inconvenience, the better practice is for the mortgagor to execute a mortgage to the executors, or trustees, without putting notice of the trust on the mortgage, and then for the executors or trustees to execute a separate declaration of their trust. To meet the former, it is advisable not to give the mortgagor notice of the fact of the money being in trust.

Joint mortgages to trustees.

But there is a further rule in equity, viz., that if two or more persons advance their own moneys on mortgage, whether in equal proportions or not, and the mortgage is limited to them so as to create a joint tenancy at law, nevertheless, in equity, they shall be considered as tenants in common, and there shall be no survivorship between them. The consequence is, that if a mortgage is made to two or more persons without notice of the trust on the face of the deed, so that they appear to have made advances of their proper moneys, and if one of them die before the mortgage money is paid off, the concurrence of the executor or administrator of the deceased mortgagee becomes necessary in the discharge. The contrary was held in one case (*b*), but it cannot be supported (*c*). This inconvenience gave rise to the practice of expressly stating that the money advanced belonged to the persons advancing it (naming them, but not describing them as trustees) "on a joint account" (*d*).

Effect of advance on joint account.

By the Conveyancing Act, 1881 (*e*), the effect of an advance on joint account is stated in sect. 61.

> Sub-sect. (1.) "Where in a mortgage, or an obligation for payment of money, or of a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor

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(*b*) *Brasier* v. *Hudson*, 9 Sim. 1.

(*c*) *Vickers* v. *Cowell*, 1 Beav. 529. See *Steeds* v. *Steeds*, 22 Q. B. D. 537, 541; *Powell* v. *Brodhurst*, (1901) 2 Ch. 160, *inf.*

(*d*) See *Hind* v. *Poole*, 1 K. & J. 383.

(*e*) 44 & 45 Vict. c. 41.

or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due notwithstanding any notice to the payer of a severance of the joint account."

Chap. XXIX. § 1 (ix.)

Joint receipt clause.

The joint receipt clause formerly in use was binding on the mortgagees, although they did not execute the mortgage deed; and the same rule would clearly apply to a statutory declaration as to joint account.

Application of the section.

This section allows a mortgagor to disregard notice of a severance of the joint account, and applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained, and applies only to a mortgage, or obligation, or transfer made after the commencement of the Act (*f*).

Contrary intention.

The question whether several mortgagees are to take as joint tenants or as tenants in common is one of intention, and, notwithstanding the insertion of a joint account clause, evidence is admissible to show that the mortgagees are entitled to the mortgage money as tenants in common (*g*).

Payment to one.

Where payment is made to one of the mortgagees during the other's lifetime, it only discharges the security to the extent of the payee's beneficial interest (if any) even though he ultimately becomes the survivor (*h*).

Husband and wife.

Where money is advanced by husband and wife on a joint account, but there is nothing to show how it was so advanced, the wife surviving is entitled to the whole sum (*i*).

Transfer of mortgage on change of trustees.

Although the adoption of the course above recommended obviates all inconvenience on payment off of the mortgage debt, or on transfer of the security before any change of trustees occurs, a difficulty must necessarily arise when the mortgage has to be transferred on an appointment of new trustees. The deed of transfer should be separate from, but executed contemporaneously with, the deed appointing the new trustee (*k*). Various expedients have been used to avoid disclosing the

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(*f*) See sect. 61, sub-sects. (2), (3).

(*g*) *Re Jackson, Smith* v. *Sibthorpe*, 34 Ch. D. 732.

(*h*) *Powell* v. *Brodhurst*, (1901) 2 Ch. 160.

(*i*) *Re Scott, Palmer* v. *Vickers*, 97 L. T. 537.

(*k*) See *Fowler* v. *Reynal*, 3 Mac. & G. 500, 507.

Chap. XXIX. § 1 (ix.)

trust by the deed of transfer so as to put notice of the trust on the title. Some conveyancers introduce a declaration that the mortgagees are trustees, and have no beneficial interest, conceiving that this affirmation, which refers to no specific trust, would not render it incumbent on any person paying off the mortgage to inquire into the nature of the trust; but having regard to the doctrine of constructive notice, it would clearly be unsafe to rely upon this expedient in practice (*l*). Others recite that the amount of the loan has been paid by the continuing and new trustees to the old trustees, a course open to the objection that the recital is at variance with fact. Others recite that the new and continuing trustees have become entitled to the amount of the loan and the securities for the same, and have required the transfer of the mortgage accordingly. But the fact that no consideration is mentioned for the transfer, is such as to create suspicion, and it is not clear that a subsequent purchaser would not be entitled to inquire how it was that the transferees became entitled to the mortgage moneys. The best method is to recite in the transfer that the old trustees are trustees of the moneys for the continuing and new trustees, to whom the moneys belong on a joint account, and who are desirous of having the securities for the same vested in them. This method has been judicially approved by Pearson, J., as affording a protection to purchasers against any trusts affecting the property (*m*).

A statement in the mortgage deed that the money was advanced on a joint account is not sufficient even in connection with the fact that the mortgage was in immediate and suggestive sequence to the exercise of a trust for sale, and that the parties to the two transactions were the same, to affect a purchaser with notice of the trust (*n*).

But if the trusts are disclosed accidentally or otherwise, and it appears that the mortgagees were not the original trustees, the purchaser is entitled to know that the mortgagees were duly appointed trustees (*o*).

(*l*) See *Jones* v. *Smith*, 1 Ph. 244; *Bridgman* v. *Gill*, 24 Beav. 306.

(*m*) *Re Harman and Uxbridge Rail. Co.*, 24 Ch. D. at p. 726; and see 42 Ch. D. at p. 272; *Re Blaiberg and Abrahams*, (1899) 2 Ch. 340.

(*n*) *Re West and Hardy*, (1904) 1 Ch. 145.

(*o*) *Re Blaiberg and Abrahams*, (1899) 2 Ch. 340.

By the Conveyancing Act, 1911 (*p*), it is provided that where on the transfer of a mortgage the stamp, if payable according to the amount of the debt, would exceed 10*s.*, a purchaser shall not by reason only of the transfer bearing a 10*s.* stamp be deemed to have notice of any trust, or that the transfer was made for effectuating the appointment of a new trustee.

Vesting declaration on appointment of new trustee.

By the 12th section of the Trustee Act, 1893 (*q*), it was provided that, on the appointment of a new trustee of a settlement or will made by deed, the trust property, with certain exceptions, might be effectually vested in the new and continuing trustees by means of a vesting declaration.

Exception as to transfers of mortgages of lands, shares, stock, &c.

But this enactment does not extend to land conveyed by way of mortgage for securing money subject to the trust (*r*), nor to any share, stock, annuity, or property transferable only in the books of a company or body, or in manner directed by or under Act of Parliament. A transfer of a legal mortgage of land must, therefore, still be effected by way of conveyance of the land to the transferee. And in the case of shares, stock, &c., the transfer must be according to the mode prescribed by the Companies Acts or other statute applicable to the particular case.

Mortgage by deposit of deeds.

Where, however, the mortgaged land was not *conveyed* originally, a vesting declaration will be sufficient to pass the estate therein. So, where a memorandum accompanying a deposit of deeds by way of mortgage contained a declaration by the mortgagor of trust of the legal estate; and the mortgagee appointed new trustees; it was held that a vesting declaration by the mortgagee in the deed of appointment operated under sect. 12 of the Act of 1893, to vest the legal estate in the trustees (*s*).

Vesting order.

Where a conveyance of mortgaged land is not obtainable on an appointment of a new trustee, a vesting order may generally be obtained which will have the same effect as if all proper conveyances of the land had been executed by all necessary parties (*t*).

Covenant to repair.

A trustee is not guilty of negligence merely because he does

(*p*) 1 & 2 Geo. V. c. 37, s. 13.

(*q*) 56 & 57 Vict. c. 53, s. 12.

(*r*) *London and County Banking Co.* v. *Goddard*, (1897) 1 Ch. 642, 649.

(*s*) *London and County Banking Co.* v. *Goddard*, (1897) 1 Ch. 642.

(*t*) 56 & 57 Vict. c. 53, ss. 26 to 40. See *Re Harrison's Settlement*, W. N. (1883) 31.

not insist on having in the mortgage deed a covenant by the mortgagor to keep the mortgaged premises in repair (*u*).

Nor is he guilty of negligence because he takes a mortgage without a clause excluding sect. 18 of the Conveyancing Act, 1881, so as to preclude the mortgagor from granting occupation leases (*x*).

◆

Section II.

Of Mortgages to Trustees of Charities.

Old Mortmain Act.

i.—Of the Power of Charity Trustees to invest in or hold Real Securities under the Old Law.—By sect. 1 of the Mortmain Act, 9 Geo. II. c. 36, s. 1 (*y*), all grants, transfers, and conveyances of lands or hereditaments, corporeal or incorporeal, and all charges or incumbrances thereon, in trust or for the benefit of any charitable use, were rendered void unless made in accordance with certain prescribed formalities and conditions, and unless the deed was made to take effect in possession and without any condition for the benefit of the grantor. The effect of this enactment was to render it incompetent for any corporation or trustees to invest charitable funds under their control on mortgage of lands except under the special provisions of some Act of Parliament or under licence from the Crown.

Exception in favour of universities, &c.

An exception from the operation of this enactment was by this Act made in favour of the Universities of Oxford and Cambridge and the colleges therein, and also the Colleges of Eton, Winchester and Westminster (*z*), and the exception has been extended by subsequent statutes in favour of other institutions.

Power for charity trustees to invest on mortgage.

By 33 & 34 Vict. c. 34, s. 1, all corporations and trustees in the United Kingdom, holding moneys in trust for any public or charitable purposes, may invest such moneys on any real security (which includes legal and equitable mortgages and charges upon lands or hereditaments of any tenure, or upon any

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(*u*) *Shaw* v. *Cates*, (1909) 1 Ch. 389.

(*x*) *Ibid.*

(*y*) Repealed and virtually re-enacted by the statute 51 & 52 Vict. c. 42.

(*z*) 9 Geo. II. c. 36, s. 4; 51 & 52 Vict. c. 42, s. 7.

estate or interest therein, or any charge or incumbrance thereon), authorized by or consistent with the trusts on which such moneys are held, without being deemed thereby to have acquired or become possessed of land within the meaning of the Mortmain Laws, or of any prohibition or restraint against the holding of land in any charter or Act of Parliament; and no contract for or conveyance of any interest in land, made *bonâ fide* for the purposes only of such security, shall be deemed void by reason of non-compliance with 9 Geo. II. c. 36.

Even before the passing of this Act, it was held that a proviso for redemption was not "a condition for the benefit of the grantor" within the Mortmain Acts (*a*).

Where the trust deeds of certain Methodist chapels contained powers of raising money for purposes of the trusts by mortgage, it was held that any of the trustees of the chapels might advance money on such mortgages and might exercise all the rights and remedies of mortgagees as against the trust estates (*b*).

Mortmain, &c. Act, 1888.

The statute 9 Geo. II. c. 36 is now repealed by the Mortmain and Charitable Uses Act, 1888 (*c*), which, however, imposes on dispositions of interests in land for the benefit of charities restrictions similar to those imposed by the repealed Act.

Testamentary gifts of mortgages.

As regards testamentary dispositions in favour of charity, the effect of the statutory restrictions is that mortgages on land or any interest therein could not, prior to the Mortmain Act, 1891, be made the subject of a bequest to charities or placed in mortmain.

All mortgages, including arrears of interest thereon, were within the mischief of the Mortmain Acts (*d*); also money secured by judgment (*e*), and money bequeathed to pay off an equitable charge on land (*f*), and money arising from the sale of partnership real estate (*g*). So the lien of a vendor for his purchase-money (*h*), and a premium on a lease unpaid, is a lien on the leasehold, and within the Mortmain Acts (*i*): in fact any device by which land might be reached was void;

(*a*) *Doe* v. *Hawkins*, 2 Q. B. 212.

(*b*) *Att.-Gen.* v. *Hardy*, 1 Sim. N. S. 338.

(*c*) 51 & 52 Vict. c. 42.

(*d*) *Att.-Gen.* v. *Meyrick*, 2 Ves. Sen. 44; *Jeffries* v. *Alexander*, 8 H. L. C. 594.

(*e*) *Collinson* v. *Pater*, 2 R. & My. 344.

(*f*) *Waterhouse* v. *Holmes*, 2 Sim. 162.

(*g*) *Brook* v. *Badley*, L. R. 3 Ch. 672; *Ashworth* v. *Munn*, 15 Ch. D. 363, 370, C. A.

(*h*) *Harrison* v. *Harrison*, 1 R. & My. 71.

(*i*) *Shepheard* v. *Beetham*, 6 Ch. D. 597.

thus a covenant that executors should pay a sum of money for charities, was within the Acts so far as relates to chattels real (*k*).

But where a person entitled to a sum under a covenant by her husband, declared by deed charitable trusts of the money, the trust was held valid, although the money could only be paid by calling in a mortgage of realty (*l*).

Bequest of mortgage abroad.

A bequest to a charity by a testator domiciled here of a mortgage on land in a colony where the old Mortmain Act is still in force, is invalid, its validity being governed by the *lex rei sitæ* (*m*).

Charges on tolls, &c.

Many securities, not strictly mortgages of land, were issued under statutory powers by companies and corporations possessed of land, by which the undertaking and the rates and tolls thereof were charged, and it was contended that they constituted such an interest in land as to bring them within the Mortmain Acts.

It had been held that shares in such a company or corporation did not fall within the statute, on the ground that the holder had no direct right to any part of the rates or tolls, only a share in the profits (*n*).

Debentures.

Instead of applying the same broad principle to the bonds and debentures of such companies and corporations, the Courts drew nice distinctions from the form of the securities, and attempted to reconcile the conflicting cases. It was thus doubtful how far mortgages, or debentures, or debenture stock, or assignments of tolls, or rates of railways, or other companies, were within the Acts. In some cases they had been held to be within it, and void. In others they had been held not to be void.

A solution was found in the case of *Gardner* v. *London, Chatham and Dover Railway Co.* (*o*), by which it was decided that a mortgage debenture made by a railway company in the form given in Schedule C. of the Companies Clauses Consolidation Act, 1845 (*p*), does not give the debenture holder a specific charge upon the surplus lands of the company, or the proceeds

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(*k*) *Jeffries* v. *Alexander*, 8 H. L. C. 594.

(*l*) *Re Robson, Emley* v. *Davidson*, 19 Ch. D. 156, C. A.; *Re Watts, Cornford* v. *Elliott*, 29 Ch. D. 947, C. A.

(*m*) *Re Hoyles*, (1911) 1 Ch. 179.

(*n*) *Myers* v. *Perigal*, 2 De G. M. & G. 599; *Re Langham's Trusts*, 10 Ha. 446.

(*o*) 2 Ch. 201.

(*p*) 8 & 9 Vict. c. 16.

of the sale of them, so as to entitle him to an order for a receiver of the sale moneys or interim rents. The conclusion from this case was, that the mortgagee has only a right to take the tolls, and has not an interest which is within the Mortmain Act (*q*). This view has been adopted in subsequent cases, and the question is now set at rest. The principle is, that the holder of such securities has no interest in the land, but only a right, by receivership or otherwise, to the net earnings (*r*). If, on the other hand, the debenture assigns or charges the land itself, or tolls or rates charged thereon or some specific portion thereof, the security will confer an interest in land within the Mortmain Acts so as to avoid a charitable bequest of such a debenture (*s*).

A charge on police rates is not an interest in land, because, by the statute 7 & 8 Vict. c. 33, the justices have no longer any power to levy a rate, but receive the money from the overseers of the poor, who raise it by rate or otherwise (*t*).

Alteration of the law as to testamentary gifts of land and interests therein.

ii.—Mortmain, &c. Act, 1891.—The above remarks apply only to wills of testators dying before the 5th August, 1891. As regards wills made by persons dying on or after that date (*u*), the law with regard to testamentary gifts for charitable purposes has been materially altered by the Mortmain and Charitable Uses Act, 1891 (*x*). This Act enacts as follows:—

Meaning of "land."

Sect. 3. "'Land' in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land; and the definition of land contained in the Mortmain and Charitable Uses Act, 1888, is hereby repealed."

Meaning of "assurance."

Sect. 4. "In this Act the word 'assurance' shall have the same meaning as in the Mortmain and Charitable Uses Act, 1888."

By the last-mentioned Act the expression "assurance," for

(*q*) *Holdsworth* v. *Davenport*, 3 Ch. D. 651. See now Mortmain Act, 1891, s. 3, *inf.*

(*r*) *Attree* v. *Hawe*, 9 Ch. D. 337, C. A.; *Re Christmas, Martin* v. *Lacon*, 33 Ch. D. 332, C. A.; *Re Thompson, Bedford* v. *Teal*, 45 Ch. D. 161, C. A.; *Re Parker, Wignall* v. *Park*, (1891) 1 Ch. 682; *Re Pickard, Elmsley* v. *Mitchell*, (1894) 3 Ch. 704, C. A.

(*s*) *Re David, Buckley* v. *Royal National Lifeboat Institution*, 43 Ch. D. 27; *Re Holmes, Holmes* v. *Holmes*, 63 L. T. 477.

(*t*) *Re Harris*, 15 Ch. D. 561. And see *Jervis* v. *Lawrence*, 22 Ch. D. 202.

(*u*) *Re Bridger, Brompton Hospital* v. *Lewis*, (1894) 1 Ch. 297, C. A.

(*x*) 54 & 55 Vict. c. 73.

the purposes of that Act, includes not only assurances by deed or other instrument operating *inter vivos*, but also devises, bequests, and other assurances by will or codicil (*y*).

Effect of definitions.

The effect, therefore, of the exclusion from the above definition of "land," for the purposes of both Acts, of money secured on land or other personal estate arising from or connected with land, renders impure personalty (other than leaseholds) capable of being freely and effectually given by will to charity. Thus, charitable bequests of money secured on mortgage of land, whether in fee or for years, or by deposit of title deeds, and of arrears of interest on any such mortgage, and of money charged by way of mortgage, or sums invested on any such mortgage, also charitable bequests of money secured by judgments charging land, or by vendor's lien—all of which gifts were formerly void—are now rendered valid as regards wills of testators dying after the passing of the Act. So, also, a charitable gift may now be made by will of or out of the proceeds of land devised on trust for sale. And the fact that a sum of money bequeathed to charity is to be raised by sale of lands which have not been sold at the testator's death will not avoid the gift.

Testamentary gift of mortgage valid.

As regards the benefit of the security, when money secured by mortgage is given by will to charity, the position would now seem to be as follows:—The legal estate in the mortgaged land, that is to say, the land itself at law, subject to the equitable right of redemption subsisting in the mortgagor, will immediately on the death of the testator vest in his "personal representatives," notwithstanding any expressions in the will purporting to devise such legal estate directly to the charity or to trustees for its benefit. But by the statute 33 & 34 Vict. c. 34, s. 1 (*z*), corporations and trustees holding money in trust for any public or charitable purpose are empowered to invest the same in real securities without being deemed thereby to have acquired or become possessed of land in mortmain. It would therefore seem that the executors may make a transfer of the mortgage security to the charitable legatee, and that the latter may accept such transfer, and continue to hold the security in accordance with the provisions of the last-mentioned Act; and, further, that such a transfer will not require to be made with

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(*y*) 51 & 52 Vict. c. 42, s. 10.

(*z*) See *ante*, p. 554.

any of the formalities required by the Act of 1888 in the case of conveyances of land.

Testamentary gifts of debentures valid.

The recent enactment removes all doubt as to the validity of testamentary gifts to charitable uses of bonds and debentures secured by public bodies on rates or tolls, notwithstanding that such instruments amount to specific assignments of interests in land.

Marshalling not now necessary.

It is obvious that the result of these changes in the law is to do away with the necessity of inserting in wills containing charitable gifts any direction for the marshalling of the testator's property for the purposes of such gifts. And, where a charitable legacy is given free of duty, the duty may now be paid out of impure personalty.

Gift of mortgage *inter vivos* for charity.

It is to be observed that the operation of the Act of 1891 is confined to testamentary dispositions, and that a gift *inter vivos* of money secured on mortgage of land or of other impure personalty to or for the benefit of charity, must still be made in accordance with sect. 4 of the Act of 1888 (*a*).

School-house.

Neither the Act of 1888 nor so much of the Act of 1891 as requires land to be sold within a year, applies to an assurance of land for the purpose of a school-house for an elementary school (*b*).

(*a*) *Re Hume, Forbes* v. *Hume*, (1895) 1 Ch. 422, C. A.

(*b*) 2 Edw. VII. c. 42, s. 23 (5).

CHAPTER XXX.

MORTGAGES TO BUILDING AND FRIENDLY SOCIETIES.

SECTION I.

MORTGAGES TO BUILDING SOCIETIES.

As to unincorporated building societies.

i.—Power of Building Societies to lend on Mortgage.—The Benefit Building Societies Act, 1836 (*a*), whereby societies of this nature were governed prior to the 2nd November, 1874, incorporated the Friendly Societies Acts then in force (*b*), so far as they were applicable; and this included the framing, certifying, and enrolling of rules (*c*).

Property vested in trustees.

By the stat. 10 Geo. IV. c. 56, s. 21, all property (including securities for money) of friendly societies was vested in trustees, and, upon their death or removal, vested in the new trustees without assignment or conveyance. This provision is still in force as regards building societies which have not a certificate of incorporation under the Building Societies Act, 1874 (*d*).

Power to lend on mortgage under 6 & 7 Will. IV. c. 32.

By the 6 & 7 Will. IV. c. 32, benefit building societies were enabled to raise by the subscriptions of their members, by shares not exceeding the value of 150*l*. for each share, such subscriptions not to exceed in the whole 20*s*. per month for each share, a stock or fund for the purpose of enabling each member to receive out of the funds the amount or value of his or her share or shares, to erect or purchase dwelling-houses, or other real or leasehold estate, to be secured by way of mortgage to such society, until the amount or value of the shares advanced should have been fully repaid to such society with interest, and all fines or other payments in respect thereof; and no member was to receive from the funds any interest or dividend by way of annual or other periodical profit upon any shares, until the

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(*a*) 6 & 7 Will. IV. c. 32.

(*b*) 10 Geo. IV. c. 56; 4 & 5 Will. IV. c. 40. The statutes are now repealed, see *post*, p. 582.

(*c*) See *Mulkern* v. *Lord*, 4 App. Ca. 182.

(*d*) 37 & 38 Vict. c. 42, s. 7. See *ante*, p. 466.

amount or value of his or her share should have been realized, except on the withdrawal of such member according to the rules of such society; and the form of mortgage or other instrument was to be specified in a schedule to the rules of such society.

Form of mortgages.

There is nothing in this Act to prevent a society of this description from lending money on mortgage as well to its members as to strangers, without regard to the purpose for which it might be applied (*e*).

Loans to strangers.

No share must exceed 150*l*. in value, but any member may subscribe for and hold more shares than one, though the value of such shares exceeds in the whole the value of 150*l*. (*f*).

Shares not to exceed 150*l*.

By the Building Societies Act, 1874 (*g*), the Act of 1836 is repealed, but so as not to affect any then subsisting society certified under the repealed Act, until such society has been incorporated under the later Act. All incorporated building societies, whether originally formed under the repealed Act or under the Act of 1874, are governed by the latter Act, as amended by subsequent Acts (*h*), and by regulations issued under sect. 44 of the Act of 1874.

As to incorporated building societies.

By sect. 13 of the Act of 1874, it is enacted as follows:—

Power to lend on mortgage under Act of 1874.

> "Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by the subscriptions of the members, a stock or fund for making advances to members out of the funds of the society, upon security of freehold, copyhold, or leasehold estate, by way of mortgage; and any society under this Act shall, so far as is necessary for the said purpose, have power to hold land with the right of foreclosure, and may from time to time raise funds by the issue of shares of one or more denominations, either paid up in full, or to be paid by periodical or other subscriptions, and with or without accumulating interest, and may repay such funds when no longer required for the purposes of the society. Provided always, that any land to which any such society may become absolutely entitled by foreclosure, or by surrender or other extinguishment of the right of redemption shall, as soon afterwards as may be conveniently practicable, be sold or converted into money."

By sect. 5 of the Act, a terminating society in this Act means a society which, by its rules, is to terminate at a fixed date, or

Terminating and permanent societies.

(*e*) *Cutbill* v. *Kingdom*, 1 Exch. 494.

(*f*) *Morrison* v. *Glover*, 4 Exch. 430, where Parke, B., admitted the incorrectness of his dictum to the contrary in *Cutbill* v. *Kingdom*, *sup*.

(*g*) 37 & 38 Vict. c. 42, s. 7.

(*h*) 38 & 39 Vict. c. 9; 40 & 41 Vict. c. 63; 47 & 48 Vict. c. 41; 57 & 58 Vict. c. 47.

when a result specified in its rules is attained; a permanent society means a society which has not, by its rules, any such fixed date or specified result at which it shall terminate.

The Act of 1836 does not notice the distinction between these two classes of societies, but many of the societies formed under that Act were terminating societies.

What the rules are to contain.

By sect. 16 of the Act of 1874, the rules of every society thereunder shall contain among other particulars—

> "(4.) The terms upon which shares may be withdrawn, and upon which mortgages may be redeemed.
> "(8.) Provision for an annual or more frequent audit of the accounts, and inspection by the auditors of the mortgages and other securities belonging to the society; and
> "(11.) Provision for the custody of the mortgage deeds and other securities belonging to the society."

Clause (4) of sect. 16 of the Act of 1874 is repealed by the Building Societies Act, 1894 (*i*), and it is thereby enacted that the rules of every society established or substituting a new set of rules for its existing rules after the passing of this Act, shall set forth (among other particulars)—

> "(e) The manner in which advances are to be made and repaid, the deductions, if any, for premiums, and the conditions upon which a borrower can redeem the amount due from him before the expiration of the period for which the advance was made, with tables, where applicable in the opinion of the registrar, showing the amount due from the borrower after each stipulated payment."

Prohibition of ballot for advances.

By sect. 12 of the Act of 1894, ballotting for advances is prohibited in the case of any society established after the passing of the Act; and existing societies, whose rules provide that advances may be ballotted for, may, notwithstanding anything in their rules, by a bare majority of members voting personally or by voting papers at a meeting called for the purpose, resolve to discontinue the practice.

Societies can lend only on real or leasehold securities.

ii.—On what Securities Advances may be made.—Building societies, as well under the repealed Act as under the present Acts, can only advance money on the security of landed property, freehold, copyhold or leasehold. An advance to a

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(*i*) 57 & 58 Vict. c. 47, s. 28, and 2nd Sched. This Act came into operation on the 1st of January, 1895, except as otherwise expressed. See sect. 30 of the Act.

member on the security of his shares is invalid, and renders the directors making the advance liable for breach of trust (*k*). In lending on the security of real or leasehold property, however, directors of building societies have a larger discretion than ordinary trustees, and are accordingly not under an obligation to avoid investments of a speculative or hazardous character; they may take collateral security for their loan on unauthorized property, as interests on personalty, but, if they do so, the propriety of the transaction must be tested independently of the collateral security (*l*).

Advance on second mortgage prohibited.

By sect. 13 of the Act of 1894, building societies are prohibited from lending money on the security of a second mortgage, and directors who have authorized such an advance are made jointly and severally liable for any loss occasioned thereby to the society.

Where a society was prohibited by its rules from lending on a second mortgage, and, being in want of money, induced a third person to lend to a mortgagor a sum of money, which was applied in reducing his mortgage debt, and, in order to secure this loan, the society postponed their first charge to the lender's security, it was held that the transaction was *ultra vires* and void (*m*).

Infant.

The Building Societies Act, 1874, does not enable an infant member to borrow money on mortgage from the society, and such a mortgage is absolutely void (*n*).

Societies to make annual audits and statements of funds to members.

iii.—Accounts and Audits of Mortgage Investments.—The 40th section of the Act of 1874 provides that building societies shall make audits and annual accounts of (amongst other matters) their assets, including "the balance due or outstanding on their mortgage securities (not including prospective interest), and the amount invested in the funds or other securities; and every such account and statement shall be attested by the auditors to whom the mortgage deeds and other securities belonging to the society shall be produced, and such account or statement shall be countersigned by the secretary or other

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(*k*) *Cullerne* v. *London, &c. Permanent Benefit Building Soc.*, 25 Q. B. D. 485.

(*l*) *Sheffield & South Yorks. Permanent Building Soc.* v. *Aizlewood*, 44 Ch. D. 412.

(*m*) *Portsea Island Building Soc.* v. *Barclay*, (1895) 2 Ch. 298, C. A.

(*n*) *Ante*, p. 358.

officer; and every member, depositor, and creditor for loans shall be entitled to receive from the society a copy of such account and statement, and a copy thereof shall be sent to the registrar within fourteen days after the annual or other general meeting at which it is presented, and another copy thereof shall be suspended in a conspicuous place in every office of the society under this Act."

A statement of account under sect. 40 does not amount to an acknowledgment of the mortgagor's title within sect. 7 of the Real Property Limitation Act, 1874, so as to preclude the operation of that section (*o*).

Form of annual account and statement.

By sect. 2 of the Act of 1894 it is enacted (sub-sect. (1)), that every such account and statement shall be made up to the end of the official year of the society to which it relates, and shall be in the prescribed form; and the same sub-section further enacts as follows:—

"Provided that every such account and statement shall set forth:—

(a) With respect to mortgages to the society upon each of which the present debt does not exceed five thousand pounds (not being mortgages where the repayments are upwards of twelve months in arrear, or where the property has for upwards of twelve months been in possession of the society), the number of all such mortgages, and the aggregate amount owing thereon at the date of the account or statement, such information being given separately in respect of each of the four following classes:—

(i.) Where the debt does not exceed five hundred pounds;

(ii.) Where the debt exceeds five hundred pounds, and does not exceed one thousand pounds;

(iii.) Where the debt exceeds one thousand pounds, and does not exceed three thousand pounds;

(iv.) Where the debt exceeds three thousand pounds, and does not exceed five thousand pounds; and

(b) With respect to any other mortgage to the society, the particulars shown by the appropriate tabular form in the First Schedule to this Act.

"(2.) Every auditor, in attesting any such annual account or statement, shall either certify that it is correct, duly vouched, and in accordance with law, or specially report to the society in what respect he finds it incorrect, unvouched, and not in accordance with law, and shall also certify that he has at that audit actually inspected the mortgage deeds and other securities belonging to the society, and shall state the number of properties with respect

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(*o*) *Re Metropolis and Counties Building Soc.*, (1911) 1 Ch. 698.

to which deeds have been produced to and actually inspected by him.

"(3.) A copy of every such annual account and statement shall be sent to the registrar within fourteen days after the annual or other general meeting at which it is presented, or within three months after the expiration of the official year of the society, whichever period expires first.

"(4.) For the purposes of this section the expression 'official year' shall mean, in the case of any society established after the passing of this Act, the year ending with the thirty-first day of December, and, in the case of any society established before the passing of this Act, the year ending with the time up to which its annual account and statement is made at the passing of this Act.

"(5.) This section shall not come into operation until the expiration of twelve months after the passing of this Act."

Constitution and purpose of building societies.

iv.—Form of the Security.—Benefit building societies generally consist of two classes of members, investing or unadvanced members, and borrowing or advanced members. The purpose of such a society, whether terminating or permanent, is to promote the acquisition by its members of small freehold, copyhold, or leasehold properties for the erection of dwelling-houses thereon by raising, by means of small subscriptions, a fund divided into shares, out of which the society makes advances to members requiring such to the amount or value of their shares in the society, the advance being secured by mortgage to the society until the amount or value of the advanced members' shares, with interest and other payments, is fully paid (*p*). The inducement to investing members is the expectation of receiving a high return by way of interest on the amount contributed by them (*q*)—a consideration which was formerly of greater weight than now, inasmuch as loans by such societies to their members were not within the usury laws (*r*).

Form of mortgage.

The form of mortgage will depend upon the constitution and rules of the society. In the case of a terminating society an advanced member receives in anticipation, subject to discount, an amount equal to the amount that the investing members will receive on the division of the assets at the termination of the society; the mortgage is, therefore, framed so as to secure not only the repayment of the sum advanced with interest, but the

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(*p*) See 6 & 7 Will. IV. c. 32, preamble; 37 & 38 Vict. c. 42, s. 13. See also Wurtzburg on Building Societies, pp. 1 *et seq.*, 193 *et seq.*

(*q*) Per Lord Cranworth, C., in *Fleming* v. *Self*, 3 De G. M. & G. 997, at p. 1015.

(*r*) *Doe* v. *Glover*, 15 Q. B. 103.

due payment by the advanced member of his subscription and other contributions, until payment of a sum equal to the full amount to which an investing member would be entitled in respect of his share, and also of a further periodical sum called "redemption money," but which is really interest. Mortgages to permanent societies are generally framed so as simply to secure the repayment of the amount advanced, with interest, by equal instalments spread over a fixed period (*s*).

A mortgage of registered land to a building society may be in any form consistent with the rules of the society, and need not be in the form prescribed by the Land Transfer Acts (*t*).

To whom the mortgage should be made.

If the society is not incorporated, the mortgage security must be taken in the names of its trustees (*u*). Where the mortgagor is one of the trustees of the society, the mortgage will be made to the other trustees and their successors (*x*). If the society is incorporated, the security is made to the society itself.

By the Act of 1874 it is enacted:—

Forms of mortgage, &c.

Sect. 19. "Any society under the Act, in a schedule to its rules, may describe the forms of conveyance, mortgage, transfer, agreement, bond, security for deposit, or loan or other instrument necessary for carrying its purposes into execution."

Property to vest on incorporation.

Sect. 27. "All rights of action and other rights, and all estates and interests in real and personal estate whatsoever [now (*y*)] belonging to or held in trust for any society certified under the said repealed Act (*z*) shall, on the incorporation of the society under this Act, vest in the society without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of Great Britain and Ireland, and estates in copyhold or customary hereditaments the title to which cannot be transferred without admittance."

In case of copyholds.

Sect. 28. "Where any society under this Act is entitled in equity to any hereditaments of copyhold or customary tenure by way of mortgage, the lord of the manor of which the same are held shall from time to time, if required by the society, admit such persons, not more than three, as the society appoints, to be trustees on its behalf as tenants in respect of such hereditaments on payment of the usual fines, fees, and other dues payable on the admission of a single tenant, or may admit the society as tenant in respect of the same on payment of such special fine, or compensation in lieu of fine, and fees as may be agreed upon."

(*s*) Wurtzburg on Building Societies, p. 193.

(*t*) Land Transfer Act, 1897, s. 9 (3).

(*u*) 10 Geo. IV. c. 56, s. 21, *ante*, p. 560.

(*x*) See *Walker* v. *Giles*, 6 C. B. 662.

(*y*) This section is to be read as if the word "now" were omitted therefrom: see 40 & 41 Vict. c. 63, s. 3.

(*z*) *I.e.*, the statute 6 & 7 Will. IV. c. 32: see *ante*, p. 560.

Ordinary law of mortgage applies.

v.—**Nature and Operation of the Security.**—Mortgages to building societies are governed by the ordinary law of mortgage, except so far as such law is necessarily modified by the special nature of the security, or by statutory enactment.

Transfer.

It seems doubtful whether a building society has the ordinary right of a mortgagee to transfer his security to a third person (*a*). There are many objections to such a transfer, which, however, might be got over (*b*); but of course if the mortgagor consents, there is no difficulty (*c*). Assuming, however, the validity of the transfer, it is clear that the transferee cannot exercise the power of sale where it is given to "the trustees or trustee for the time being of the society" (*d*).

Foreclosure.

The form of the foreclosure decree in the case of a mortgage to a building society is similar to that in ordinary mortgages (*e*).

Trust for sale.

Where, however, the mortgage is in the form of a trust for sale to secure the repayment of the loan, the proper remedy will be an order for sale and not foreclosure (*f*).

Registered mortgage.

As to foreclosure or sale where the security is by a charge registered under the Land Transfer Act, 1875, see the provisions of that Act (*g*).

Costs.

A building society is entitled as of right, like any ordinary mortgagee, to its costs in an action for foreclosure or redemption in the absence of vexatious or oppressive conduct on its part (*h*).

It is, however, obvious that the position of a mortgagor to a building society is by no means the same as that of an ordinary mortgagor, and that his rights must be more or less affected by the contract of membership, as well as by the contract of mortgage (*i*).

Terms of redemption.

The terms on which an advanced member of a building society is entitled to redeem his mortgage will depend as well

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(*a*) *Re Rumney and Smith*, (1897) 2 Ch. 351.

(*b*) *Ibid.* p. 360, per Chitty, L.J.

(*c*) *Ibid.* p. 359, per Lindley, L.J.

(*d*) *Ibid.*

(*e*) *Provident Permanent Building Soc.* v. *Greenhill*, 9 Ch. D. 122; *Bell* v. *London and South Western Bank*, W. N. (1874) 10; for a form of foreclosure order as to accounts, see *Boney* v. *Charter*, W. N. (1887) 52.

(*f*) *Kirkwood* v. *Thompson*, 2 H. & M. 392, 402. See *Locking* v. *Parker*, L. R. 8 Ch. 30; *Re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284.

(*g*) 38 & 39 Vict. c. 87, ss. 26, 27. See *ante*, p. 47.

(*h*) *Cotterell* v. *Stratton*, L. R. 8 Ch. 295.

(*i*) Per Fry, J., in *Rosenberg* v. *Northumberland Building Soc.*, 22 Q. B. D. 373, at p. 380.

on the rules of the particular society as on the provisions contained in the mortgage deed (*k*).

If the terms of the mortgage deed vary from the rules of the society, and the mortgagor claiming to redeem does not seek to have the deed reformed, he is bound by its terms (*l*).

In the case of a permanent society, if the rules are unambiguous, there is no great difficulty in estimating how much the mortgagor ought to pay to entitle him to redeem. But questions have not unfrequently arisen as to the proper terms of redemption in the case of terminating societies, owing to the difficulty of calculating the probable duration of the society.

Right to redeem of member of terminating society.

Where a mortgage had been duly executed by a member (who had become the purchaser of twelve and a half shares) of the property that he purchased with the sum advanced by the society for that purpose, a question arose whether the mortgagor had a right to have the accounts taken on the common principle of debiting him with the principal sum advanced and interest, and crediting him with the amount of his monthly subscriptions and payments, or on the principle of treating him as a shareholder, who had received the value of his shares in advance, and who was bound to continue his monthly payments during the continuance of the society; and the Court, on the construction of the mortgage deed, held the latter principle to be the correct one, and directed the master to find the amount of the future payments, upon a calculation of the probable duration of the society, though the rules of the society were ambiguous on the point (*m*). And, in a similar case, the mortgagor was, on the same ground of construction, held bound to pay the full amount of all future payments which might become due during the probable duration of the society, in order to redeem (*n*). The agreement in the rules for acceleration of all such future payments, if *any* instalment is not punctually paid, has nothing in common with a penalty (*o*).

In a suit for redemption by a member, a decree was made directing calculation of the longest possible duration of the society at the date of the notice of redemption, having regard to

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(*k*) *Andrews* v. *City Permanent Building Soc.*, 44 L. T. 641.

(*l*) *Mosley* v. *Baker*, 3 De G. M. & G. 1032, n.

(*m*) *Mosley* v. *Baker*, *sup.*

(*n*) *Seagrave* v. *Pope*, 1 De G. M. & G. 783.

(*o*) See *Wallingford* v. *Mutual Soc.*, 5 App. Ca. 685.

the net assets of the society, and to the monthly subscriptions and redemption money still continuing payable, and to the number of 100*l.* shares to be provided for, and charging the plaintiff as a present debt with all subscriptions and redemption money which would become payable by him assuming the society to endure for the whole of the calculated period, and crediting him with the amount of bonus payable at the date of the notice to withdrawing members (*p*). In such a case, the mortgagor is entitled to credit for redemption moneys paid in by him (*q*).

No allowance will be made to the mortgagor in respect of profits, where the redemption takes place at a period at which a withdrawing member could have obtained by the rules no right to profits; but profits will be allowed if by the rules the advanced members are entitled on redemption to the same profits as withdrawing members (*r*), although the amount was a greater sum than the society's funds could bear (*r*).

An advanced member was held to be entitled to redeem on payment of his subscriptions to the end of the year, estimated as the probable duration of the society, although he continued liable to pay subscriptions until 120*l.* a share had been realized for every member, and the society was not allowed to retain the deeds as a security for such subscriptions (*s*).

Where an executor of a will obtained a loan from a building society of which he was a member, for the purposes of the administration of his testator's estate, on a mortgage of a house belonging to that estate, and the deed contained a covenant by the executor to pay principal and interest, and all subscriptions, fines, &c., and a proviso that the mortgage should not be redeemable except on redemption of all other mortgages made by him to the society, it was held that, as against the estate, no liability in respect of the shares could be enforced, and that the consolidation clause was void, but that the mortgage was good to the extent of the money actually advanced, and reasonable interest (*t*).

Where, by the rules, the manager had power to determine

(*p*) *Fleming* v. *Self*, 3 De G. M. & G. 997.

(*q*) *Smith* v. *Pilkington*, 1 De G. F. & J. 120.

(*r*) *Fleming* v. *Self*, *sup.*; *Archer* v. *Harrison*, 7 De G. M. & G. 404.

(*s*) *Sparrow* v. *Farmer*, 26 Beav. 511; *Handley* v. *Farmer*, 29 Beav. 362.

(*t*) *Thorne* v. *Thorne*, (1893) 3 Ch. 196.

the amount payable on redemption, on payment of which the shares in respect of which the security was made should be extinguished, and the society, by resolution, fixed that amount at 60*l*. 10*s*. per share, it was held that a mortgagor who had by the deed covenanted to pay all subscriptions, &c. which should become due by virtue of the rules of the society, and had paid the amount fixed by the resolution, and had obtained a statutory receipt, was released from all liability to the society (*u*).

Fines.

The Act of 1836 (*x*) empowers unincorporated societies to impose and inflict such reasonable fines, &c. upon members who offend against the rules; and the Act of 1874 (*y*) provides that the rules shall set forth (among other particulars) the fines to be imposed on members of the society. Fines are frequently made payable on default in payment by advanced members of instalments of their loans, but such fines must be reasonable, otherwise they will not be enforced (*z*).

Rules of a society imposing fines in case of repayments by borrowing members being in arrear, will not (when admitting a different construction) be construed so as to authorize fines cumulative in arithmetical progression (*a*).

Interest on fines.

In taking the accounts in an action for redemption or foreclosure, fines secured by the mortgage may be treated as principal, and so carry interest, if the terms of the security so provide (*b*). But such fines are of the nature of interest for non-payment of instalments of the loan, and accordingly, if neither the mortgage deed nor the rules of the society provide for payment of interest on fines, such interest cannot be allowed, as to do so would be to give compound interest, which is contrary to the rules of equity in the absence of express agreement (*c*).

Premiums.

Where, according to the rules, premiums payable in advance might be added to the mortgage, and, by the terms of the mortgage deed, annual premiums of a specified amount per share

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(*u*) *Priestley* v. *Hopwood*, 12 W. R. 1031.

(*x*) 6 & 7 Will. IV. c. 32, s. 1.

(*y*) 37 & 38 Vict. c. 42, s. 16.

(*z*) *Lovejoy* v. *Mulkern*, 46 L. J. Ch. 630. See also *Parker* v. *Butcher*, L. R. 3 Eq. 762; *Pilkington* v. *Baker* (No. 2), W. N. (1877) 210.

(*a*) *Re Tierney*, Ir. Rep. 9 Eq. 1.

(*b*) *Provident Permanent Building Soc.* v. *Greenhill*, 9 Ch. D. 122. See *Clarkson* v. *Henderson*, 14 Ch. D. 348.

(*c*) *Parker* v. *Butcher*, L. R. 3 Eq. 762; *Ingoldby* v. *Riley*, 28 L. T. 55.

were to be paid, it was held that the premiums were to be treated as capital, and that interest was properly chargeable thereon without allowing any rebate for payment of premiums contracted to be paid (*d*).

Proof in bankruptcy.

A premium is not in the nature of interest, and, accordingly, a building society may prove in bankruptcy for future premiums, notwithstanding the rule that there can be no proof for interest after the date of the bankruptcy (*e*).

Right to interest.

Where the mortgage deed provided that, on default and sale, the trustees might retain out of the sale moneys all fines, subscriptions, and payments thereafter to become due during the period stipulated, as then immediately due, they were not entitled to retain interest after repayment of the principal, because interest is only due in respect of forbearance (*f*).

Discount.

Where the rules authorize the allowance of a discount upon subscriptions upon redemption by a member before the time, such discount is not allowed on a compulsory sale (*g*).

Mortgage to secure subscriptions and "other moneys."

Where a mortgage was made to a building society to secure the repayment of the principal by instalments and interest and "all subscriptions and other moneys becoming due," and the mortgagor assigned the equity of redemption, and afterwards embezzled moneys of the society received by him as secretary, it was held that the words "other moneys" in the mortgage deed must be read as *ejusdem generis* with the foregoing words, and as limited to sums due in respect of the mortgage, but not so as to render the assignee liable, in order to redeem the mortgage, to pay the amount due from the mortgagor as secretary which arose out of a different contract (*h*).

Mortgage by joint stock company.

It has been held that a company cannot hold shares in an unincorporated building society, and, accordingly, that if a company gives a mortgage in the ordinary form to such a society, they are entitled to redeem on the footing of an ordinary mortgage (*i*). But this decision turned entirely on the language of the Act of 1836 (*k*); and the question whether

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(*d*) *Harvey* v. *Municipal Permanent Investment Building Soc.*, 26 Ch. D. 273; *Exp. Bath, Re Phillips*, 27 Ch. D. 509.

(*e*) *Exp. Bath, Re Phillips*, 22 Ch. D. 450. As to this rule in bankruptcy, see *post*, Chap. LI.

(*f*) *Exp. Osborne, Re Goldsmith*, L. R. 10 Ch. 41.

(*g*) *Matterson* v. *Elderfield*, L. R. 4 Ch. 208. See *Re O'Donohoe's Estate*, Ir. R. 10 Eq. 221.

(*h*) *Bailes* v. *Sunderland Equitable Industrial Soc.*, 55 L. T. 808.

(*i*) *Dobinson* v. *Hawkes*, 16 Sim. 407.

(*k*) See 6 & 7 Will. IV. c. 32, s. 1.

a joint stock company can become a member of a society incorporated under the Act of 1874 has not yet been decided. Sir J. Chitty, J., has expressed his opinion, though in a case where the point did not require decision, that a company, authorized by its memorandum of association to acquire shares in other companies, might become a member of an incorporated building society (*l*).

Provision for immediate payment of future instalments on default.

Where a mortgage deed contained a provision that, on default in payment of instalments, the mortgaged property might be sold, and that on any sale all the future instalments should be immediately payable and retainable out of the proceeds of sale, subject to such discount as the directors might think fit to allow, with a covenant by the mortgagor to pay the instalments, it was held that the provision amounted to a personal covenant by the mortgagor that, on default in payment of the instalments, he would pay the whole sum remaining due, subject to the allowed discount (*m*). Such a provision is not of the nature of a penalty (*n*).

Continuance of subscriptions after advance.

Generally, an advanced member of a permanent society is required only to pay the prescribed instalments, and not also to continue to pay subscriptions after the advance, but it would seem that if the rules otherwise provide, the society will be entitled to enforce the payment of such subsequent subscriptions and to treat them as part of the security for the advance (*o*).

By sect. 30 of the Act of 1874 if an advanced member of an incorporated society died intestate leaving an infant heir, the society, after selling the mortgaged premises, may pay to the administrator any surplus proceeds of sale to the amount of 150*l*., to be considered as personal estate and liable to duty accordingly.

Alteration of rules subsequently to advance.

The question has been raised in several cases how far an advanced member of a building society is bound by any alterations of the rules which may be made subsequently to the date of the loan. It is apparent that the rights of the member in

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(*l*) *Bristol and Clifton Permanent Building Soc.* v. *Harbour*, cited in Wurtzburg on Building Societies (4th ed.) at p. 158. As to the meaning of "person" in Acts of Parliament, see *Pharmaceutical Soc.* v. *London and Provincial Supply Assoc.*, 5 App. Ca. 857.

(*m*) *Sherriff* v. *Glenton*, 28 L. T. 65.

(*n*) *Protector Endowment Loan and Annuity Co.* v. *Grice*, 5 Q. B. D. 592.

(*o*) *Moxon* v. *Berkeley Mutual Benefit Building Soc.*, 59 L. J. Ch. 524.

respect of his mortgage are affected by his contract of membership; and further, that the contract of membership carries *in gremio* the right of the society to alter its rules from time to time (*p*). It would thus appear that an advanced member would be bound by subsequent alterations of the rules, even though his position in regard to the security should thereby be altered to his detriment. And such appears to be the general rule, at all events where the covenant in the mortgage is to pay what shall be due according to the rules "for the time being."

Altered rules held not to bind mortgagor on construction of deed and rules.

The decision of Hall, V.-C., in *Smith's Case* (*q*), is apparently inconsistent with the above principle, but, so far as it is so, it must be regarded as overruled by the decision of the Court of Appeal referred to below. In *Smith's Case*, however, the language both of the covenant and of the altered rules was somewhat restricted. The covenant was to pay, *at the times and in manner* prescribed by the rules for the time being, the sums payable periodically by way of subscription or otherwise. The altered rules, whereby members were to become liable to pay additional sums as contribution for losses, provided, "so far as the rules of law and equity should permit," such rules should apply to all members and transactions as well past as future. It was held that an advanced member was entitled to redeem without payment of the additional sum.

Altered rules bind mortgagor generally.

In *Wilson* v. *Miles Platting Building Society* (*r*), by the rules in force at the date of the mortgage, advanced members were not liable to contribute to losses of the society. The mortgage contained a covenant to pay "all subscriptions and contributions, interest, fines, premiums of insurance, and other moneys which, according to the rules for the time being of the society and the provisions herein contained, shall from time to time become due and payable, and which ought to be done and performed by the mortgagor." The proviso for redemption was expressed in similar terms. The rules of the society were subsequently altered, and the directors were empowered to charge a member paying off any share in respect of which an advance had been made with such a sum in respect of such share as would, *pro ratâ* with other subscriptions and paid-up shares, be sufficient to cover any loss or anticipated

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(*p*) Per Fry, L.J., in *Rosenberg* v. *Northumberland Building Soc.*, 22 Q. B. D. at p. 380, C. A.

(*q*) 1 Ch. D. 481.

(*r*) 22 Q. B. D. 381, n., C. A.

loss to the society. It was held by the Court of Appeal that the mortgage was subject to the altered rule, and was redeemable only on the footing of that rule. Sir H. Cotton, L.J., pointed out that in *Smith's Case* (s) the covenant in terms contemplated only that the time and manner of payment might be from time to time varied, and did not refer to additional sums which might be prescribed by the rules for the time being; and further, that the application of the altered rules was qualified by making them applicable only "so far as the rules of law and equity would permit." His lordship said that if the decision of Sir C. Hall, V.-C., in that case meant that, generally, rules made after the date of a security would not apply, he should differ from that view.

The case of *Rosenberg* v. *Northumberland Building Society* (t) was very similar to the case of *Wilson* v. *Miles Platting Building Society*, and the Court of Appeal considered themselves bound by and followed the decision in that case.

In *Bradbury* v. *Wild* (u), Kekewich, J., applied the principle of the decisions in the last two cases in a case where the mortgage did not refer to the rules "for the time being."

The registrar's certificate is conclusive as to the validity of the proceedings of the society in the matter of altering the rules (x).

Rights of mortgagors on winding-up of societies.

Where the surveyor of a building society purchased land from the society, and executed a mortgage in ignorance of a recital therein that he was a member of the society, he was held not to be a contributory on the winding up of the society (y).

Under the winding up of a building society, where there are no creditors other than members, an advanced member can pay up his loan and be discharged as a contributory (z).

Where all outside debts have been paid, and a mortgagor, being an advanced shareholder, is under the rules of redemption to cease to be a member of the society, he is not liable to contribute to a call on winding up of the society for the purpose of satisfying the claims of the unadvanced shareholders (a), but he is liable on his covenant to pay subscriptions, though he cease to be a member before they fall due (*b*).

(s) 1 Ch. D. 481.

(t) 22 Q. B. D. 373.

(u) (1893) 1 Ch. 377.

(x) *Dewhurst* v. *Clarkson*, 3 E. & B. 194; *Rosenberg* v. *Northumberland Building Soc.*, *sup.*

(y) *Empson's Case*, L. R. 9 Eq. 597.

(z) *Brownlie* v. *Russell*, 8 App. Ca. 235.

(a) *Re Doncaster Permanent Building Soc.*, L. R. 3 Eq. 158.

Where, however, claims of outside creditors remain unsatisfied, an advanced member, having a right to redeem on payment of all subscriptions, fines, and other sums payable under the rules, is not, by such payment, relieved from his liability to contribute to the payment of the outside debts on the winding up of the society, but must contribute *pari passu* with the unadvanced members (*c*).

Upon the winding up of a benefit building society, the rules of the society still continue in force (*d*).

Paid-up shares at interest, with the right to withdraw the money in preference to the ordinary unadvanced members, are legal; they are not loans by the society, but like preference shares, and the holders will be entitled, in the winding up of the society, to be paid in preference to other unadvanced members (*e*).

Proceedings for dissolution of society.

Sect. 32 of the Act of 1874 provides that a society may be dissolved with the consent of three-fourths of the members, holding not less than two-thirds of the shares, by an instrument of dissolution, which is to set forth certain prescribed particulars and to be duly registered.

Such an instrument of dissolution does not operate so as to compel advanced members, whose loans are by the rules repayable by instalments, to pay up forthwith the balances due on their securities (*f*). Until recently, a winding-up order made by the Court apparently operated as a compulsory withdrawal, and, consequently, under such an order, an advanced member could be called upon to pay the same amount as would be due from him, if at the date of the order he had sought to redeem his advance (*g*).

(*b*) *Farmer* v. *Giles*, 5 H. & N. 753.

(*c*) *Re West London, &c. Building Soc.*, (1894) 2 Ch. 352 (an unincorporated society).

(*d*) *Re Blackburn and District Benefit Building Soc.*, 24 Ch. D. 421, C. A.

(*e*) *Re Guardian Permanent Benefit Building Soc.*, *Scott's Case*, 23 Ch. D. 453, affd. on appeal, *sub nom. Murray* v. *Scott*, 9 App. Ca. 519.

(*f*) *Kemp* v. *Wright*, (1895) 1 Ch. 121, C. A.

(*g*) *Brownlie* v. *Russell*, 8 App. Ca. 235; *Tosh* v. *North British Building Soc.*, 11 App. Ca. 489. See *London Provident Building Soc.* v. *Morgan*, (1893) 2 Q. B. 266.

Now, however, by sect. 10 of the Act of 1894, it is enacted that:—

Liability of borrowing members in event of dissolution.

"When a society under the Building Societies Acts is being dissolved or wound up, a member to whom an advance has been made under any mortgage or other security, or under the rules of the society, shall not be liable to pay the amount payable under the mortgage or other security, or rules, except at the time or times and subject to the conditions therein expressed. This section shall come into operation immediately after the passing of this Act."

This section applies to a society the dissolution of which was begun before, but was not completed at, the time when the section came into operation (*h*).

As to unincorporated societies.

vi.—Arbitration.—By sect. 27 of the statute 10 Geo. IV. c. 56 (incorporated in the statute 6 & 7 Will. IV. c. 32, and, consequently, still in force as to unincorporated building societies formed prior to 1856), it is provided that disputes between a society and its members are to be settled by arbitration if so determined by the rules thereof.

As to incorporated societies.

By sect. 34 of the Building Societies Act, 1874 (*i*), the rules of a society under this Act may direct disputes to be referred to arbitration.

What disputes are referable to arbitration.

With regard to unincorporated societies, it has been finally decided that the provisions in the rules for arbitration of disputes do not apply to redemption suits, because no means are provided for working out a decree for redemption, delivery of deeds, and consequential directions, and therefore the jurisdiction of the Courts is not interfered with (*k*).

But this rule was held not to apply in the case of an incorporated society; and accordingly, where an advanced member of such a society, wishing to sell his mortgaged property, commenced an action for an account against the society, it was held that the jurisdiction of the Court was ousted, and that the matter must be referred (*l*).

(*h*) *Kemp* v. *Wright*, (1895) 1 Ch. 121, C. A. The effect of the enactment is to abrogate, in cases falling within it, the decision in *London Provident Building Soc.* v. *Morgan*, (1893) 2 Q. B. 266.

(*i*) 37 & 38 Vict. c. 42.

(*k*) *Mulkern* v. *Lord*, 4 App. Ca. 182.

(*l*) *Wright* v. *Monarch Investment Soc.*, 5 Ch. D. 726. See also *Hack* v. *London, &c. Building Soc.*, 23 Ch. D. 103, C. A.; *Municipal Permanent, &c. Soc.* v. *Kent*, 9 App. Ca. 260.

Now, however, by the Building Societies Act, 1884 (*m*), it is enacted as follows:—

Definition of word "disputes" in Act of 1884.

"The word 'disputes' in the Building Societies Acts [1874 to 1884], or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member, in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided; and, in the absence of any such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed, or any contract contained in any document, other than the rules of the society, and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled."

To bring a dispute within the arbitration clause, it must be one which arises between the trustees and a person whose claim to be a member of the society is not in dispute (*n*).

The provisions of the Arbitration Act, 1889, will apply to the reference except so far as they are inconsistent with the above Acts or the rules or procedure recognized by them (*o*).

Statutory receipt under Act of 1836.

vii.—Reconveyance.—By sect. 5 of the Benefit Building Societies Act, 1836 (*p*) (which is still in force, notwithstanding the repeal of the Act, as regards societies formed under that Act before 1856 (*q*), and not having obtained a certificate of incorporation under the Building Societies Act, 1874), it was enacted that it should be lawful for the trustees named in any mortgage made on behalf of such societies, or the survivors or survivor of them, or for the trustees for the time being, to indorse upon any mortgage, or further charge, given by any member of such society to the trustees thereof for moneys advanced by such society to any member thereof, a receipt for all moneys intended to be secured by such mortgage or further charge, which should be sufficient to vacate the same, and vest the estate of and in the property comprised in such security in the person or persons for

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(*m*) 47 & 48 Vict. c. 41.

(*n*) *Prentice* v. *London*, L. R. 10 C. P. 679.

(*o*) Arb. Act, 1889, s. 24.

(*p*) 6 & 7 Will. IV. c. 32.

(*q*) See 57 & 58 Vict. c. 47, s. 25 (2).

the time being entitled to the equity of redemption, without it being necessary for the trustees of any such society to give any reconveyance of the property so mortgaged; which receipt should be specified in a schedule to be annexed to the rules of such society duly certified and deposited as aforesaid (*r*).

Statutory receipt under Act of 1874.

By sect. 42 of the Act of 1874 (by which all incorporated building societies are governed, whether formed under this Act or formed under the repealed Act, and having obtained a certificate of incorporation under this Act), it is enacted as follows:—

> "When all moneys intended to be secured by any mortgage or further charge given to a society under this Act in England or Ireland have been fully paid or discharged, the society may indorse upon or annex to such mortgage or further charge a reconveyance of the mortgaged property to the then owner of the equity of redemption or to such persons and to such uses as he may direct, or a receipt under the seal of the society countersigned by the secretary or manager in the form specified in the schedule to this Act, and such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption, without any reconveyance or re-surrender whatever; and if the said mortgage or further charge has been registered under any Act for the registration or record of deeds or titles, the registrar under such Act, or his deputy or assistant registrar, or the recording officer, as the case may be, or, in the case of copyholds or lands of customary tenure, if the mortgage or further charge has been entered on any court rolls, the steward of the manor, or his deputy, respectively shall, on production of such receipt verified by oath of any person, make an entry opposite the entry of the charge or mortgage, to the effect that such charge or mortgage is satisfied, and shall grant a certificate either on the said mortgage or charge or separately to the like effect, which certificate shall be received in evidence in all Courts and proceedings without any further proof, and which entry shall have the effect of clearing the register or record of such mortgage, and the registrar or recording officer shall be entitled to a fee of two shillings and sixpence for making the said entry and granting the said certificate, and such fee shall in Ireland be paid by stamps and applied as the other fees of the Registry of Deeds Office and Record of Title Office are now by law directed to be paid and applied."

Similar language of both statutes.

A form of receipt is given in the schedule to the Act.

The question as to the effect of a statutory receipt has frequently come before the Courts for determination. It will

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(*r*) See *ante*, p. 560.

be observed that the language of both statutes on this point is very similar, so that it would seem that decisions on cases arising under the Act of 1836 are generally applicable to cases arising under the later Act.

Effect of statutory receipt as to vesting the property.

It must now be taken as law that a receipt given under either of the Acts vests the legal estate in the person who in equity is best entitled to call for it, and not necessarily in the person who actually paid off the society (*s*).

Thus, where there are successive equitable mortgagees, and the society is paid off by the mortgagor, the effect of the statutory receipt is to vest the legal estate in the equitable mortgagee who is first in point of time, unless the society is paid off by an equitable mortgagee, in which case the legal estate vests in that mortgagee, notwithstanding that there are incumbrances prior to his in point of date (*t*).

In *Pease* v. *Jackson* (*u*), a legal mortgage was made to a building society constituted under the Act of 1836, and the mortgagor subsequently gave a second mortgage to the plaintiff; the defendants, at the request of the mortgagor, paid off the first mortgage; a receipt was accordingly indorsed on that mortgage, and the title deeds were handed over to the defendants, who had no notice of the plaintiff's charge; the mortgagor at the same time executed a mortgage of the property to the defendants to secure the amount paid by them to the society, together with a further advance to the mortgagor. It was held that the defendants had the better equity, and that, therefore, the rule "*qui prior est tempore potior est jure*" did not apply; and further, that on the satisfaction of the first mortgage, the legal estate vested, by virtue of the statute, either in the mortgagor, or in the persons who had the best right to call for it, in either of which cases it passed to the defendants.

Notice not material.

The decision was the same in *Crosbie-Hill* v. *Sayer* (*x*), and the facts were not materially different, except that in *Pease* v. *Jackson* the second mortgagees had taken security with notice of the outstanding legal mortgage, but this fact is not really material (*y*).

(*s*) *Crosbie-Hill* v. *Sayer*, (1908) 1 Ch. 866.

(*t*) *Pease* v. *Jackson*, L. R. 3 Ch. 576; and see *Priestley* v. *Hopwood*, 12 W. R. 1031; *Re Page* (No. 2), 32 Beav. 485; *Marson* v. *Cox*, 14 Ch. D. 140; *Robinson* v. *Trevor*, 12 Q. B. D. 423, C. A.; *Hosking* v. *Smith*, *inf.*

(*u*) L. R. 3 Ch. 576.

(*x*) (1908) 1 Ch. 866.

(*y*) *Ibid.* per Parker, J.

Tacking further advances.

In several cases (*z*) it was also decided that a third person paying off a building society, who obtains a receipt and the title deeds, and takes a mortgage to secure the amount so paid and a further advance to the mortgagor, is not entitled to tack the further advance. But this part of the decisions referred to has been overruled by the House of Lords in *Hosking* v. *Smith* (*a*), in which the circumstances were very similar to those in *Pease* v. *Jackson*. It was held that the person who paid off the society, at the request of the mortgagor, and without notice of an intermediate charge, taking a fresh mortgage for the money paid and a further advance, had priority, by virtue of the receipt on the first mortgage, over the second mortgagee, not only in respect of the money paid to the society, but also in respect of the advance made to the mortgagor.

Effect of statutory receipt as to vacating the debt.

It is to be observed, however, that sect. 5 of the Act of 1836 provides that the effect of the receipt shall be to vacate the "mortgage or further charge," but that by sect. 42 of the Act of 1874 the effect of a receipt under that Act is to vacate the "mortgage or further charge *or debt*." And, accordingly, in two cases arising under the earlier Act, it was held that a covenant in a mortgage given by an advanced member to pay subscriptions until every member should have realized a specified sum per share, was not put an end to by the indorsement on the mortgage of a statutory receipt (*b*). But, in a later case, where the society was incorporated under the Act of 1874, and an advanced member had mortgaged property to secure a loan and all further payments due from him to the society, it was held by the Court of Appeal that the indorsement of a statutory receipt, though given under a mistake, put an end to the covenant in the mortgage, not only as to the principal and interest, but also as to all payments in respect of shares, and precluded the society from saying that there was any debt due from the mortgagor (*c*).

The receipt may be delivered merely as an escrow, the society being entitled to show that they had in fact never been paid off (*d*).

(*z*) *Pease* v. *Jackson*, L. R. 3 Ch. 576; *Robinson* v. *Trevor*, 12 Q. B. D. 423; *Sangster* v. *Cochrane*, 28 Ch. D. 298.

(*a*) 13 App. Ca. 582.

(*b*) *Farmer* v. *Smith*, 4 H. & N. 196; *Sparrow* v. *Farmer*, 26 Beav. 511.

(*c*) *Harvey* v. *Municipal Building Soc.*, 26 Ch. D. 273, followed in *London and County Building Soc.* v. *Angell*, 65 L. J. Q. B. 194.

(*d*) *Lloyds Bank* v. *Bullock*, (1896) 2 Ch. 192.

Reconveyance by deed,

There is a further difference in the language of the two statutes in that the Act of 1836 merely authorizes the giving of a receipt, the effect of which is to vacate the charge and vest the estate in the person entitled to the equity of redemption without necessity for a reconveyance; but the Act of 1874 empowers a society to indorse on or annex to the mortgage either a reconveyance or a receipt which is to operate to vacate the charge or debt, and vest the estate "without any reconveyance or surrender." And it further provides for the entry on the court rolls, and the giving of certificates of satisfaction in the case of mortgages of copyholds.

—by unincorporated society,

The trustees of an unincorporated society may still reconvey mortgaged property by deed instead of giving a statutory receipt, but, if so, apparently, the reconveyance will operate under the ordinary law as would any other reconveyance, and the rights of parties will be regulated accordingly (*e*).

So, also, if the trustees of an unincorporated society have been admitted to copyholds, it seems that a re-surrender will be necessary.

—by incorporated society,

If, however, an incorporated society executes a reconveyance instead of giving a statutory receipt, sect. 42 of the Act of 1874 requires the reconveyance to be made "to the owner of the equity of redemption, or to such persons and to such uses as he shall direct," and the effect will be to vest the estate in such person or persons, and in him or them only; the statutory reconveyance and the statutory receipt are alternative modes of attaining the same object, viz., the vesting of the legal estate in the same person, that is, the owner for the time being of the equity of redemption (*f*).

—by society after incorporation.

If a mortgage made to the trustees of an unincorporated society which is subsequently incorporated, is paid off after incorporation, then, inasmuch as by sect. 27 of the Act of 1874 the property vested in the society on incorporation without transfer by the trustees, the indorsed receipt or reconveyance given by the society will effectually vacate the mortgage and vest the legal estate by virtue and in accordance with the statute (*g*).

(*e*) *Carlisle Banking Co.* v. *Thompson*, 28 Ch. D. 398 (a case under the Friendly Societies Act, 1875); *inf.* n. (*m*).

(*f*) Per Jessel, M.R., in *Fourth City Mutual Benefit Building Society* v. *Williams*, 14 Ch. D. 140, at p. 146.

(*g*) See sect. 27, set out *ante*,

It seems doubtful whether when a society is in liquidation the statutory receipt is sufficient.

Society in liquidation. Registered land.

In the case of registered land, if the mortgage is retained by the society, the discharge may be effected by indorsing the usual statutory receipt and cancelling the charge at the registry (*h*). If the charge has been filed in the registry, the discharge may be effected by an instrument of discharge in the prescribed form (*i*).

Stamps.

The statutory receipt appears to be in all cases exempt from stamp duty, whether the society is incorporated (*k*) or unincorporated (*l*), and a reconveyance by deed is also exempt (*m*).

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Section II.

Mortgages to Friendly Societies.

Repeal of former Acts.

i.—Power of Friendly Societies to lend on Mortgage.—The Friendly Societies Acts of Geo. IV. and Will. IV., referred to in the early part of this Chapter, were repealed by the Friendly Societies Act, 1855; and that Act was repealed by the Friendly Societies Act, 1875, which in turn was repealed by the Friendly Societies Act, 1896, whereby the law on the subject was consolidated and amended.

The Friendly Societies Act.

The power of friendly societies to lend money on mortgage is now governed by the provisions of the Act of 1896.

Vesting of property of society.

All property of a society is vested in its trustees for the time being; and the property of a branch is vested in the trustees of that branch, or in the trustees of the society if the rules of the society so provide (*n*).

Devolution on death, &c. of trustee.

Upon the death, resignation, or removal of a trustee, the property vests in the succeeding trustees either solely or together with any surviving or continuing trustees, and, until appointment of succeeding trustees, in such surviving or continuing trustees only, or in the executors or administrators of the last

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p. 566; and see *Fourth City Mutual Benefit Society* v. *Williams*, *sup.* at p. 143.

(*h*) Land Transfer Rules, 122.

(*i*) Rule 167, Form 48.

(*k*) B. S. Act, 1874, s. 41.

(*l*) 10 Geo. IV. c. 56, s. 37.

(*m*) *Old Battersea Building Soc.* v. *Inland Revenue Commissioners*, (1898) 2 Q. B. 294.

(*n*) 59 & 60 Vict. c. 25, s. 49.

surviving or continuing trustee as personal estate (whether the same be real or personal) without conveyance and assignment, except as regards stock and securities in public funds (*o*).

In legal proceedings the property is to be stated to be the property of the trustees by name as trustees for the society or branch, without further description (*p*).

Admittance to copyholds.

Where a society is entitled in equity to any copyholds or customary lands absolutely or by way of mortgage, the lord is from time to time to admit the trustees (not to exceed three) of the society as tenants on payment of the fines and dues payable on admission of a single tenant (*q*).

Power of trustees to invest on mortgage.

The trustees, with the consent of the committee of management or of a majority of the members of a society present and entitled to vote at a general meeting, may from time to time invest the funds of such society or any part thereof to any amount (among other investments) upon any security expressly directed by the rules of the society, not being personal security, except as provided by the Act with respect to loans (*r*).

With respect to loans to assured members it is enacted (*s*) that:—

Loans to members.

"A registered society, and subject to the rules of the society a registered branch, may advance to a member of at least one full year's standing any sum not exceeding one-half of the amount of an assurance on his life on the written security of himself and two satisfactory sureties for repayment. The amount so advanced with all interest thereon may be deducted from the sum assured without prejudice in the meantime to the operation of the security."

With respect to loans out of separate loan fund it is enacted (*t*) that:—

Loans out of separate loan fund.

"A society may, out of any separate loan fund to be formed by contributions or deposits of its members, make loans to its members on their personal security, with or without sureties, as may be provided by the rules, subject to the following restrictions:—

(a) A loan shall not at any time be made out of moneys contributed for the other purposes of the society;

(b) A member shall not be capable of holding any interest in the loan fund exceeding two hundred pounds;

(*o*) 59 & 60 Vict. c. 25, s. 50.

(*p*) *Ibid.* s. 51.

(*q*) *Ibid.* s. 48.

(*r*) *Ibid.* s. 44.

(*s*) *Ibid.* s. 45.

(*t*) *Ibid.* s. 46.

(c) A society shall not make any loan to a member on personal security beyond the amount fixed by the rules, or make any loan which, together with any money owing by a member to the society, exceeds fifty pounds;

(d) A society shall not hold at any one time on deposit from its members any moneys beyond the amount fixed by the rules, which shall not exceed two-thirds of the total sums owing to the society by the members who have borrowed from the loan fund."

Loans on unauthorized security.

Loans by trustees of a friendly society on personal security not authorized by the Act, though amounting to a breach of trust on the part of the trustees, so as to render them liable for any loss, are not illegal so as to preclude the trustees from recovering the money lent (*u*).

Upon the death or bankruptcy (including liquidation by arrangement in England, *cessio bonorum* in Scotland, and petition for arrangement in Ireland) of any officer of a registered society or branch having in his possession by virtue of his office any money or property belonging to the society or branch, or if any execution, attachment or other process be issued, or action or diligence raised against such officer, or against his property, his heirs, executors, or administrators, or trustee in bankruptcy, including an assignee in Ireland, and a judicial factor in Scotland, or the sheriff or other person executing such process, or the party using such action or diligence respectively, shall upon demand in writing of the trustees of the society or branch or any two of them, or any person authorized by the society or branch or by the committee of management of the same, to make such demand, pay such money, and deliver over such property to the trustees of the society or branch in preference to any other debt or claim against the estate of such officer (*x*).

The institution of a suit is sufficient demand in writing, and the neglect of the trustees of the society to audit the accounts of the defaulting officer will not deprive the society of the statutory right of priority (*y*).

An incorporated banking company cannot be an "officer" of a friendly society within the meaning of the above enactment, and an order cannot, accordingly, be made thereunder for pay-

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(*u*) *Re Coltman*, 19 Ch. D. 64, C. A.

(*x*) 59 & 60 Vict. c. 25, s. 35. See *Re Eilbeck*, (1910) 1 K. B. 136.

(*y*) *Absolom* v. *Gething*, 32 Beav. 322, under the corresponding provisions of the repealed stat. 18 & 19 Vict. c. 63, s. 23.

ment to the trustees of the society of moneys in the possession of such a company as treasurer of the society (*z*).

Settlement of disputes.

Disputes between a member, or a person claiming through a member, and the society or its officers, are to be settled conclusively in manner directed by the rules of the society (*a*).

Discharge of mortgages by receipt indorsed or annexed.

ii.—Reconveyance.—A receipt under the hands of the trustees, countersigned by the secretary for all moneys secured to the society or branch by any mortgage or other assurance being in the form prescribed by the Act, such receipt being indorsed upon or annexed to the mortgage or assurance, vacates the same, and vests the property in the person entitled to the equity of redemption without re-conveyance or re-surrender (*b*).

Registration, &c. of receipt.

If the mortgage or assurance have been registered under any Act, or entered on any court rolls, the registrar under such Act, or steward of the manor, or keeper of the register shall, on production of such receipt, verified by oath of any person, enter satisfaction on the register or on the court rolls, respectively, of such mortgage or charge, and shall grant a certificate either upon such mortgage, or separately, to the like effect, which certificate shall be received in evidence in all Courts and proceedings without further proof (*c*).

The trustees of an unincorporated society may, however, re-convey by deed instead of by statutory receipt (*d*).

(*z*) *Re West of England and South Wales District Bank, Exp. Swansea Friendly Soc.*, 11 Ch. D. 768, C. A.

(*a*) 59 & 60 Vict. c. 25, s. 68. See as to the extent of this enactment, *Palliser* v. *Dale*, (1897) 1 Q. B. 257, and cases there cited.

(*b*) 59 & 60 Vict. c. 25, s. 53, not applying to Scotland or Jersey. A similar provision is contained in the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 43.

(*c*) *Ibid.* A fee of two shillings and sixpence is payable for the entry and certificate.

(*d*) *Ante*, p. 581.

Part IV.

VOID AND VOIDABLE SECURITIES.

CHAPTER XXXI.

MORTGAGES WHICH ARE VOID AS BEING IN FRAUD OF CREDITORS.

SECTION I.

FRAUDULENT CONVEYANCES UNDER STAT. 13 ELIZ. c. 5.

Preference at common law.

i.—Avoidance of Conveyances made in Fraud of Creditors.—At common law a debtor may prefer any creditor, or any set of creditors, and that although he is insolvent (*a*), and though such preference would be void under the Bankruptcy Acts. Even a declaration of trust by the debtor of property for his creditor, though uncommunicated to him, is valid, notwithstanding the debtor knew he was insolvent (*b*). But various enactments have from time to time been passed by the legislature for rendering void dispositions of property made with intent to defeat the claims of creditors.

Stat. 13 Eliz. c. 5.

The stat. 13 Eliz. c. 5 (made perpetual by the stat. 29 Eliz. c. 5), after a preamble stating the purpose of the Act to be the avoiding of feigned, covinous and fraudulent feoffments and other conveyances, "to the end, purpose and intent, to delay, hinder or defraud creditors of their just and lawful actions," &c., enacts as follows:—

Fraudulent conveyances declared void

Sect. 1. "All and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods

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(*a*) *Evans* v. *Jones*, 3 H. & C. 423; *Middleton* v. *Pollock, Exp. Elliott*, 2 Ch. D. 104.

(*b*) *Ibid.; Sharp* v. *Jackson*, (1899) A. C. 419; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. 231, C. A.

and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise; and all and every bond, suit, judgment and execution, at any time had or made to or for any intent or purpose before declared and expressed, shall be deemed and taken (only as against such person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous or fraudulent devices and practices as is aforesaid, are, shall, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect."

as against the creditors.

Sect. 5. "Provided always, that this Act shall not extend to any estate or interest in lands, goods, or chattels, had, made, conveyed, or assured, which estate or interest shall be upon good consideration, and *bonâ fide* lawfully conveyed or assured to any person or persons, not having at the time of such conveyance or assurance any manner of notice or knowledge of such covin, fraud, or collusion as aforesaid."

Proviso for conveyances made *bonâ fide* and on good consideration.

The effect of this enactment is to render void as against the creditors generally of the mortgagor all mortgages which are made with intent to defeat their claims; and also to render void as against creditors of the settlor, except so far as protected by sect. 5, mortgages of interests derived under settlements which are fraudulent and void under the Act (*c*).

Effect of this enactment.

This statute only applies to such things as may be taken in execution, and, therefore, previous to 1 & 2 Vict. c. 110, the assignment of a bond was not within the statute; nor an assignment of stock; nor of any chose in action (*d*); nor were copyholds, unless by tenure or special custom they were subject to debts (*e*).

What property is within the statute.

But now cash, bank notes, and stock (*f*), which may be taken in execution, fall within the Act (*g*), as also a policy of insurance (*h*), and copyholds, which are now subject to execution (*i*). So choses in action are within the Act (*k*), and a settlement of equitable reversionary personalty may be so since a creditor

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(*c*) For an able discussion of the avoidance of settlements as fraudulent under this Act, reference may be made to Vaizey on Settlements, vol. ii. pp. 1526 *et seq.*

(*d*) *Norcutt* v. *Dodd*, Cr. & Ph. 100.

(*e*) *Mathews* v. *Feaver*, 1 Cox, 278.

(*f*) See 1 & 2 Vict. c. 110, s. 12.

(*g*) *Barrack* v. *McCulloch*, 3 K. & J. 110.

(*h*) *Stokoe* v. *Cowan*, 29 Beav. 637.

(*i*) 1 & 2 Vict. c. 110, s. 11.

(*k*) *Edmunds* v. *Edmunds*, (1904) P. 362.

may reach it by a charging order or the appointment of a receiver (*l*).

Retention of chattels by mortgagor.

ii.—The Intention to Defraud Creditors—Retention of Possession of Mortgaged Property by Mortgagor.—The question how far the retention of possession by a mortgagor of chattels raises an inference of intent to defraud creditors has been already considered (*m*).

Retention of possession of land by mortgagor.

It is well settled that a mortgage of lands of any tenure cannot be impeached merely on the ground of the mortgagor retaining the possession and enjoyment thereof (*n*).

Whether the question of intent to defraud within the statute is one of law or of fact.

Some conflict of judicial opinion appears to have arisen as to whether an intent to defeat or delay creditors must be inferred as a matter of law, where it appears, as a matter of fact, that the effect or result of the assignment in question is to defeat or delay creditors; and high authority may be adduced (*o*) in support of an affirmative answer to this question; but the preponderance of authority is clearly in favour of the principle, that the language of the Act being that the conveyance of property is void as against creditors only if it is made with intent to defeat, hinder or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the intention of the assignor, in making the assignment, was to defeat or delay his creditors (*p*). The test in each case is whether the assignment was a *bonâ fide* deed for the benefit of creditors or whether its real object was to benefit the debtor at the expense of the creditors (*q*). The Court must look at the whole circumstances surrounding the assignment and see whether it was in fact executed with the intent to defeat or delay creditors (*r*).

Actual intention to defeat or delay creditors need not be proved if the circumstances are such that the assurance would necessarily have that effect (*s*); but the mere fact that it has

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(*l*) *Ideal Bedding Co.* v. *Holland*, (1907) 2 Ch. 157.

(*m*) See *ante*, pp. 181 *et seq.*

(*n*) Shep. Touchst. by Preston, 267.

(*o*) See cases cited arg. in *Freeman* v. *Pope*, L. R. 5 Ch. 538.

(*p*) *Thompson* v. *Webster*, 4 Drew. 632; *Exp. Mercer, Re Wise*, 17 Q. B. D. 290, C. A.; *Godfrey* v. *Poole*, 13 App. Ca. 497, at p. 503. See *Le Lievre* v. *Gould*, (1893) 1 Q. B. 491, at p. 500, C. A.

(*q*) *Maskelyne* v. *Smith*, (1903) 1 K. B. 671, C. A.

(*r*) *Re Holland*, (1902) 2 Ch. 360, C. A.

(*s*) *Freeman* v. *Pope*, L. R. 5 Ch.

in the result prevented an antecedent creditor from being paid, is not of itself sufficient to invalidate the assurance (*t*).

Transaction must be made in good faith.

It is not every assignment which will have the effect of delaying or hindering creditors, and, therefore, be fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors; it must be devised of malice, fraud, and the like, to bring it within the statute (*u*); and if the consideration is *bonâ fide*, the intent to defeat other creditors is not a fraud, independently of the Bankruptcy Acts; as where a debtor mortgaged all his property to secure some creditors to the exclusion of the rest, the deed was held not to fall within the statute (*x*), though it contained a proviso that the debtor should remain in possession for six months (*y*).

Similarly, a sale of goods, if *bonâ fide*, is not invalidated by knowledge that an execution is intended (*z*).

Assignment to defeat a particular creditor.

An assignment to defeat a particular creditor is not necessarily void under the statute (*a*). So an assignment by an insolvent debtor of all his property for his creditors, in order to defeat a particular creditor's execution, is not within the statute (*b*); but persons claiming under a writ of sequestration issued by the Court have priority over a mortgagee who takes his security with a knowledge that it was made to avoid the effect of the sequestration (*c*).

Whether whole property must be assigned.

It has been said that to bring a transaction within the statute it should include the whole, or substantially the whole, of the debtor's property (*d*); but this statement of the law is directly opposed to that laid down in an earlier case (*e*).

Circumstance from which intent to

The intent to defraud may be inferred from various circumstances, and it may be useful in this place to refer briefly to

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538, 545; *Re Ridler*, 22 Ch. D. 74, C. A.; *Carruthers* v. *Peake*, (1911) 55 Sol. J. 291.

(*t*) *Freeman* v. *Pope*, *sup.*; qualifying *Spirett* v. *Willows*, 3 De G. J. & S. 293.

(*u*) *Meux* v. *Howell*, 4 East, 13. See *Gale* v. *Williamson*, 8 M. & W. 405.

(*x*) *Alton* v. *Harrison*, L. R. 4 Ch. 622; *Gladstone* v. *Padwick*, L. R. 6 Ex. 211; *Allen* v. *Bonnett*, L. R. 5 Ch. 581.

(*y*) *Alton* v. *Harrison*, *sup.*

(*z*) *Hale* v. *Metropolitan Saloon Omnibus Co.*, 4 Drew. 492; *Westbury* v. *Clapp*, 12 W. R. 511; *Wood* v. *Dixie*, 7 Q. B. 892.

(*a*) *Maskelyne* v. *Smith*, 72 L. J. K. B. 237, C. A.

(*b*) *Pickstock* v. *Lyster*, 3 M. & S. 371; *Wolverhampton, &c. Co.* v. *Marston*, 7 H. & N. 148; *Darvill* v. *Terry*, 6 H. & N. 807; *Marlow* v. *Orgill*, 8 Jur. N. S. 829.

(*c*) *Ward* v. *Booth*, L. R. 14 Eq. 195. See *Empringham* v. *Short*, 3 Ha. 461.

(*d*) *Re Hirth*, (1899) 1 Q. B. at p. 260, per Lindley, M. R.

(*e*) *Alton* v. *Harrison*, L. R. 4 Ch. at p. 626, per Giffard, L. J.

the cases which indicate what circumstances may be taken into consideration in determining this question so far as such cases bear upon mortgages.

defraud may be inferred.

What insolvency is within the statute.

An element which may be taken into consideration as leading to an inference of fraudulent intent to defeat or delay creditors, is, if the debtor is at the time, or by such conveyance becomes, in insolvent circumstances, in which case it falls within the Act (*f*); but the mere owing some debts is not sufficient (*g*). It is not, however, necessary to prove a state of actual insolvency (*h*).

If, after deducting the property which is the subject of an assurance, sufficient available assets are not left for the payment of the grantor's debts, then that is an element from which the law may infer an intent to defeat creditors (*i*); but although a grantor is in embarrassed circumstances, yet, if the property not included in the assurance is ample to pay his debts, the assurance will be good, even if some of the debts remain unpaid (*k*).

The question is whether the grantor was in a position that would justify him in putting a considerable part of his property into a particular assurance (*l*).

Act may apply though grantor is solvent.

If there is an actual intent to defeat creditors, it is immaterial whether the grantor was or was not solvent at the date of the settlement (*m*); or whether he was or was not indebted at the time; as if, being a trader, he settled all his present and future property (*n*); and that notwithstanding the assurance was of a very trifling amount considering the extent of his business (*o*).

Mortgage not communicated to mortgagee.

A mortgage executed by the mortgagor when solvent in favour of a creditor, without his knowledge and without any communication with him, is valid, although the mortgagor kept it in his own possession up to the time of his death; unless

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(*f*) *Shears* v. *Rogers*, 3 B. & Ad. 362. See *Norcutt* v. *Dodd*, Cr. & Ph. 100; *Ideal Bedding Co.* v. *Holland*, (1907) 2 Ch. 157.

(*g*) *Skarf* v. *Soulby*, 1 Mac. & G. 364.

(*h*) *Townsend* v. *Westacott*, 2 Beav. 340.

(*i*) *Freeman* v. *Pope*, L. R. 5 Ch. 538, 545; *Taylor* v. *Coenen*, 1 Ch. D. 641; *Spirett* v. *Willows*, 3 De G. J. & S. 293.

(*k*) *Kent* v. *Riley*, L. R. 14 Eq. 190. See *post*, p. 494.

(*l*) *Crossley* v. *Elworthy*, L. R. 12 Eq. 158.

(*m*) *Spirett* v. *Willows*, 3 De G. J. & S. 293.

(*n*) *Ibid.*; *Ware* v. *Gardner*, L. R. 7 Eq. 317; *Taylor* v. *Coenen*, 1 Ch. D. 641.

(*o*) *Taylor* v. *Coenen*, *sup.*

it was delivered as an escrow, or fraud is proved (*p*). So a delivery of the mortgage deed by the mortgagor to his own solicitor, who retained it till the mortgagor's bankruptcy, was held a valid delivery to the mortgagees (*q*).

But a voluntary mortgage, not communicated to the creditor, and kept to be made use of if convenient, was held fraudulent under the statute 27 Eliz. c. 4 (*r*).

How far cases relating to settlements bear on mortgages.

The cases referred to in this section are, for the most part, cases in which questions have arisen as to setting aside voluntary settlements for want of consideration and other circumstances indicating an intent to defraud creditors within the meaning of the statute; but the principles underlying the decisions seem to apply to cases of mortgages.

It must, however, be borne in mind that, in the case of a mortgage, an equity of redemption of more or less value is left in the mortgagor and is available after payment of what is due to the mortgagee for principal, interest, and costs, for the purpose of satisfying the claims of creditors.

Assignment by debtor *in extremis*.

Where an insolvent debtor, shortly before his death, purported to assign absolutely certain policies of assurance on his own life of considerable amount to a particular creditor in consideration of the release of a debt due to him, the assignment, though held to be voluntary and void under the statute as an absolute assignment, was ordered to stand as a security for the debt due at the time of the assignment (*s*).

Adequacy of consideration.

The adequacy of consideration is another important, though not conclusive, element in determining the *bona fides* of a transaction (*t*). A past debt is an adequate consideration for a mortgage within the statute (*u*); *à fortiori*, if the consideration is not only an antecedent debt, but also a substantial advance made at the time when the mortgage is given (*x*). And an assignment by way of mortgage of the whole of the assignor's property present and future to one person to secure

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(*p*) *Doe* v. *Knight*, 5 B. & Cr. 671; *Exton* v. *Scott*, 6 Sim. 31. See *Dillon* v. *Coppin*, 4 My. & Cr. 662.

(*q*) *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119.

(*r*) *Cracknall* v. *Janson*, 11 Ch. D. 1, C. A. See *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21.

(*s*) *Stokoe* v. *Cowan*, 29 Beav. 637.

(*t*) See *Doe* v. *James*, 16 East, 212; *Golden* v. *Gillam*, 20 Ch. D. 389.

(*u*) *Edwards* v. *Harbin*, 2 T. R. 587; 1 R. R. 548.

(*x*) *Martindale* v. *Booth*, 3 B. & Ad. 498; *Riches* v. *Evans*, 9 C. & P. 640.

an existing debt and future advances will not be void under the statute if made in good faith (*y*).

But, though a mortgage is given in consideration of a sum actually advanced, the deed will be liable to be set aside if, by its form or effect, it shows that its intention is to protect the goods from claims of other creditors and retain the benefit and enjoyment of them to the grantor (*z*).

Whole of property.

It makes no difference whether the deed deals with the whole or only a part of the grantor's property, or even if it extends to after-acquired property; if the deed is *bonâ fide,* that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the statute of Elizabeth (*a*).

A charge upon the whole of a man's property is a valid equitable charge upon all his property existing at the date, and the mortgagee has a lien upon all such property in preference to general creditors (*b*).

Consideration not sufficient if fraud exists.

But a deed, though made for valuable and adequate consideration, may yet be void under the statute if an actual and express intent to defeat creditors is proved (*c*), subject, however, to the rights of the parties from whom the valuable consideration proceeded, in ignorance of such intention (*d*).

Voluntary settlements.

The statute also avoids mortgages of interests derived under settlements or other instruments which are themselves fraudulent and void under the statute, as against the creditors of the settlor or grantor. "It is established by a long train of decisions that a voluntary assignment made without valuable consideration, so as to defeat the rights of creditors, is fraudulent within the meaning of the statute" (*e*). But the question as to the avoidance of voluntary settlements, &c., is one of the mortgagor's title, and beyond the scope of the present treatise.

Purchaser for value.

The effect of sect. 5 of the statute is to except from the

(*y*) *Exp. Games, Re Bamford,* 12 Ch. D. 314, C. A.

(*z*) *Reed* v. *Blades,* 5 Taunt. 212; *Latimer* v. *Batson,* 4 B. & C. 652; *Graham* v. *Furber,* 14 C. B. 410; *Hale* v. *Metropolitan Saloon Omnibus Co.,* 4 Drew. 492; *Bott* v. *Smith,* 21 Beav. 511.

(*a*) *Alton* v. *Harrison,* L. R. 4 Ch. 622; *Exp. Games, Re Bamford,* 12 Ch. D. 314, C. A.; *Re Kelcey,* (1899) 2 Ch. 530.

(*b*) *Re Kelcey, sup.;* cf. *Re Jukes,* (1902) 2 K. B. 58.

(*c*) Per Lord Mansfield in *Cadogan* v. *Kennett,* Cowp. 432; *Strong* v. *Strong,* 18 Beav. 408; *Holmes* v. *Penney,* 3 K. & J. 90; *Bott* v. *Smith,* 21 Beav. 511; *Corlett* v. *Radcliffe,* 14 Moo. P. C. 121; *Cornish* v. *Clark,* L. R. 14 Eq. 184; *Three Towns Banking Co.* v. *Maddever,* 52 L. J. Ch. 733.

(*d*) *Golden* v. *Gillam,* 20 Ch. D. 389; *Halifax Banking Co.* v. *Gledhill,* (1891) 1 Ch. 31.

(*e*) *Shears* v. *Rogers,* 3 B. & Ad. 370.

operation of the Act in favour of a purchaser for value without notice, any interest, whether legal or equitable, derived under a settlement, which that statute would make void against creditors, as to other persons claiming under it. So, where by a settlement, which was fraudulent against creditors under the statute, a reversionary life interest was reserved to the settlor, who charged such interest by way of equitable mortgage to a person who advanced his money without notice that the settlement was fraudulent, it was held that the mortgage was protected by sect. 5, and was accordingly good as against the creditors of the settlor (*f*).

To invalidate an assignment made for valuable consideration it is necessary to show an actual intent to defeat or delay creditors within the purchaser's knowledge, but this intent may be inferred from the circumstances of the case (*g*).

Laches.

A suit to set aside a deed under the statute is not barred by any delay short of the period prescribed by the Statute of Limitations (*h*).

Validity of fraudulent conveyances as against assignor.

iii.—Against what Creditors a Fraudulent Conveyance will be Avoided.—The statute renders void conveyances made with intent to defraud creditors only as against persons whose actions, &c. may be defrauded or hindered, and the representatives of such persons. An assurance, though fraudulent under the statute, will therefore be valid as against the assignor himself, and as against strangers other than creditors; it will also be valid as against creditors who are cognisant of and take part in the arrangement under which the assignment is made (*i*).

Subsequent creditors.

It has been held at law that an assurance cannot be void against a person who only became a creditor after its date (*k*). But in equity an assurance is void if made with a view to defeat future debts (*l*); and when an assurance is once avoided under

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(*f*) *Halifax Banking Co.* v. *Gledhill*, (1891) 1 Ch. 31.

(*g*) *Bott* v. *Smith*, 21 Beav. 511; *Re Hirth*, (1899) 1 Q. B. 612; *Re Holland*, (1902) 2 Ch. 360.

(*h*) *Re Maddever, Three Towns Banking Co.* v. *Maddever*, 27 Ch. D. 523.

(*i*) *Steel* v. *Brown*, 1 Taunt. 381; *Robinson* v. *McDonnell*, 2 B. & Ald. 134; *Bessey* v. *Windham*, 6 Q. B. 166; *White* v. *Morris*, 11 C. B. 1015; *Olliver* v. *King*, 8 De G. M. & G. 110.

(*k*) *Oswald* v. *Thompson*, 2 Exch. 215. But see *Graham* v. *Furber*, 14 C. B. 410, per Williams, J.

(*l*) *Stileman* v. *Ashdown*, 2 Atk.

this statute, subsequent creditors may be let in together with antecedent creditors (*m*); and a subsequent creditor may himself bring an action to avoid the assurance, if any antecedent debt remains due (*n*). An assurance may be made under such circumstances as to be void against subsequent creditors, although all the antecedent creditors are paid off (*o*); as where it is made to defeat a plaintiff in an action (*p*); or where the grantor immediately afterwards realizes all the rest of his property and denudes himself of everything (*q*); or where he makes the assurance on the eve of entering into a hazardous trade, in which case the onus would fall on him to show that he was in a position to make it (*r*).

But a voluntary settlement made *bonâ fide* by a person having ample means outside the settlement for payment of present debts is not void because the effect proves to be to defeat subsequent creditors (*s*).

A creditor under a voluntary covenant or *post obit* bond is as much entitled to the benefit of this statute as any other creditor (*t*).

It is not necessary for a creditor to have a lien or charge on the property the subject of the settlement to entitle him to a decree to set it aside (*u*). Where the settlor has subsequently mortgaged all his personal estate, the chattels which are the subject of the fraudulent settlement do not, upon its being declared void, vest in the mortgagee (*x*). He has only the right of a general creditor, and must take independent proceedings to have execution of the property (*y*).

Debt of ancestor or testator.

The statute applies where the debts were contracted not by

481; *Ware* v. *Gardner*, L. R. 7 Eq. 317; *Re Lane-Fox*, (1900) 2 Q. B. 508.

(*m*) *Barton* v. *Vanheythusen*, 11 Ha. 126, 133; *Strong* v. *Strong*, 18 Beav. 408.

(*n*) *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Freeman* v. *Pope*, L. R. 5 Ch. 545; *Crossley* v. *Elworthy*, L. R. 12 Eq. 167.

(*o*) *Richardson* v. *Smallwood*, Jac. 552; *Holmes* v. *Penney*, 3 K. & J. 90, 99.

(*p*) *Barling* v. *Bishopp*, 29 Beav. 417; *Kidney* v. *Coussmaker*, 12 Ves. 148.

(*q*) *Spirett* v. *Willows*, 3 De G. J. & S. 293, 302; *Freeman* v. *Pope*, L. R. 5 Ch. 538.

(*r*) *Mackay* v. *Douglas*, 14 Eq. 106; *Exp. Russell*, 19 Ch. D. 588, C. A.

(*s*) *Re Lane-Fox*, (1900) 2 Q. B. 508.

(*t*) *Adames* v. *Hallett*, L. R. 6 Eq. 468; *Dening* v. *Ware*, 22 Beav. 184.

(*u*) *Reese River Silver Mining Co.* v. *Atwell*, 7 Eq. 347; *Goldsmith* v. *Russell*, 5 De G. M. & G. 547. But see *Lister* v. *Turner*, 5 Ha. 281.

(*x*) *Barton* v. *Vanheythusen*, 11 Ha. 126.

(*y*) *Reese River Silver Mining Co.* v. *Atwell*, *sup.*; *Lister* v. *Turner*, *sup.*

the party making the conveyance, but by the ancestor from whom he derived the estate (*z*); and a fraudulent conveyance may be made by an executor as well as by an heir (*a*).

Action to set aside conveyance.

An action by a creditor to set aside a settlement under this statute is not affected by the insolvency of the settlor subsequent to the commencement of the action (*b*). If the settlor has become bankrupt, the trustee in bankruptcy is the proper person to bring the action (*c*). And if it is right that the particular transaction should be investigated, the action, though dismissed, will be dismissed without costs as against the trustee (*d*).

Who may bring action.

Any particular creditor, including a mortgagee, whether legal or equitable, may take proceedings to set aside a voluntary settlement (*e*); but it does not appear to be free from doubt whether a creditor, even if he is a mortgagee, can sue after the bankruptcy of the debtor (*f*).

Form of decree.

The form of the decree is that the deed be declared void against the creditors, and that the defendants join in all necessary acts for raising the money for the creditors (*g*) without prejudice to the right of the defendants to recover the balance, if any, after all charges have been paid (*h*); and the decree must be on behalf of all the creditors (*i*).

Receiver.

A receiver may be appointed to secure the property until the trial of the action for the benefit of the creditors (*k*).

◆

SECTION II.

AVOIDANCE OF MORTGAGES IN BANKRUPTCY.

Fraudulent conveyances are acts of bankruptcy.

i.—Introductory Remarks.—A conveyance by way of mortgage which is "fraudulent" within the meaning of the

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(*z*) *Apharry* v. *Bodingham*, Cro. Eliz. 350; *Gooch's Case*, 5 Rep. 60. See *Richardson* v. *Horton*, 7 Beav. 112.

(*a*) *Doe* v. *Fallows*, 2 Cr. & J. 481; 2 Tyrw. 460.

(*b*) *Goldsmith* v. *Russell*, 5 De G. M. & G. 547.

(*c*) *Ibid.*

(*d*) *Re Tetley, Exp. Jeffrey*, 3 Mans. 226.

(*e*) *Ede* v. *Knowles*, 2 Y. & C. C. C. 172.

(*f*) *Lister* v. *Turner*, 5 Ha. 281. See *Willmott* v. *London Celluloid Co.*, 34 C. D. 147.

(*g*) *Bott* v. *Smith*, 21 Beav. 511; *Ideal Bedding Co.* v. *Holland*, (1907) 2 Ch. 157. See *Darvill* v. *Terry*, 6 H. & N. 807.

(*h*) *Carruthers* v. *Peake*, (1911) 55 Sol. J. 291.

(*i*) *Strong* v. *Strong*, 18 Beav. 408; *Reese River, &c. Co.* v. *Atwell*, L. R. 7 Eq. 347.

(*k*) *Re Mouatt*, (1899) 1 Ch. 831.

statute 13 Eliz. c. 5, is also void under the Bankruptcy Act, 1883 (*l*), and such conveyance will be liable to be set aside accordingly in favour of the general creditors of the mortgagor if any proceedings in bankruptcy should be founded upon such act or any other act of bankruptcy committed either before or after the conveyance within the limit of time to be presently stated. But a conveyance may be good as against an execution creditor under the statute of Elizabeth, but may, nevertheless, be bad as against the trustee in bankruptcy of the mortgagor.

Conveyance unimpeachable in bankruptcy after three months.

If a deed executed by a debtor is liable to be set aside on the ground that it is within the mischief of the bankruptcy law, it will apparently become valid and unimpeachable as against the trustee in bankruptcy after the lapse of three months from its execution, if during that period no proceedings in bankruptcy are taken against the debtor (*m*), independently of the question whether or not it may be void as against an execution creditor under the statute of Elizabeth, or generally as fraudulent against creditors.

Mortgage of debtor's whole property.

It has been seen that a conveyance by way of mortgage of a person's whole property, or of the whole with a merely colourable exception, and *à fortiori* such a conveyance of part only of his property to secure an existing debt, is not necessarily void under the statute of Elizabeth (*n*); but any such conveyance, if "fraudulent," or amounting to "fraudulent preference" within the meaning of the bankruptcy law, is an act of bankruptcy and liable to be avoided accordingly.

Bankruptcy Act, 1883.

ii.—Fraudulent Conveyances are Acts of Bankruptcy.—The enactments governing the question how far mortgage securities given by a debtor are voidable in the event of the subsequent bankruptcy of the mortgagor by his trustee, are the following sections or parts of sections of the Bankruptcy Act, 1883 (*o*).

Acts of bankruptcy.

Sect. 4. "A debtor commits an act of bankruptcy in each of the following cases:—

(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally;

(*l*) 46 & 47 Vict. c. 52.

(*m*) *Ibid.* ss. 6, 48; *Exp. Games*, 12 C. D. 314.

(*n*) See *ante*, p. 592.

(*o*) 46 & 47 Vict. c. 52.

(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof;

(c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt."

Conditions on which creditor may petition.

Sect. 6. "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:

(b) The act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition."

Relation back of trustee's title.

Sect. 43. "The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor."

Conveyance not avoided unless fraudulent by English law.

It will be observed that sect. 4 renders void the conveyances and assignments specified in clauses (a), (b), and (c) if made by a debtor "in England or elsewhere." Such instruments will, therefore, amount to acts of bankruptcy if made anywhere abroad by a person subject to English law (*p*). But a conveyance of property situate abroad out of the jurisdiction of the English Courts cannot defeat or delay creditors so as to constitute an act of bankruptcy; and a conveyance of property in England by a domiciled foreigner in his own country which can operate only according to the law of that country, is not within the section. "The section clearly means, and has always been interpreted as meaning, fraudulent by the law of England, and, therefore, cannot properly apply to a conveyance which is executed in and is to operate according to the law of a foreign country" (*q*).

Fraudulent conveyance is an act of

Sect. 4, though it makes "fraudulent conveyances" available acts of bankruptcy, does not, nor does any other section of the

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(*p*) *Exp. Blain, Re Sawers*, 12 Ch. D. at p. 532.

(*q*) *Exp. Crispin*, L. R. 8 Ch. 374; *Re A. B. & Co.*, (1900) 1 Q. B. 541.

bankruptcy, and void.

Act, expressly render such conveyances void as against the trustee, as is the case with regard to conveyances amounting to "fraudulent preferences" within the meaning of sect. 48. But the result of the decisions is such as to make it clear that, if a conveyance by a debtor is a "fraudulent conveyance" so as to constitute an act of bankruptcy, it will be invalid as against the trustee, unless saved by lapse of time (*r*).

Fraudulent conveyance not avoided if made three months before petition.

Further, the Act nowhere expressly says that a "fraudulent conveyance," to be impeachable as being an act of bankruptcy, must have been made within three months before presentation of a petition on which the debtor is adjudicated bankrupt, as is provided by sect. 48 with regard to "fraudulent preferences." But, having regard to the language of sects. 6, 43, it seems a necessary inference that a conveyance made before the commission of such act will be valid as against the trustee; and the question has been so determined by judicial decision. So, where a debtor assigned all his estate and effects by way of security for a sum then due, and a small further advance, and became bankrupt seventeen months afterwards, it was held, independently of the question as to whether the assignment was saved by the present advance (*s*), that the lapse of time which had occurred since the assignment rendered the deed valid as against the trustee in bankruptcy, though it might otherwise have been impeachable by him (*t*). So a bill of sale was upheld, though a liquidation supervened within the statutory period, where such bill was given in substitution for a previous bill of sale (*u*).

Question whether conveyance is fraudulent in bankruptcy is one of law.

In the Bankruptcy Acts prior to 1869, a conveyance must, so as to be available as an act of bankruptcy, and impeachable accordingly, have been made by a debtor fraudulently "with intent to defeat or delay his creditors"; but in the Act of that year these words were omitted from the definition of a "fraudulent conveyance," and the omission has been continued in the present Act. The effect of the omission, however, has not been to change the rule formerly prevailing in bankruptcy, that the question whether a conveyance was fraudulent against creditors

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(*r*) *Woodhouse* v. *Murray*, L. R. 2 Q. B. 638; *Re Colemere*, L. R. 1 Ch. 128, at p. 134; *Re Nurse, Exp. Foxley*, L. R. 3 Ch. 515, 519; *Re Wood*, L. R. 7 Ch. 302.

(*s*) See as to this, *infra*.

(*t*) *Allen* v. *Bonnett*, L. R. 5 Ch. 577. See also *Mercer* v. *Peterson*, L. R. 2 Ex. 304; *Jones* v. *Harber*, L. R. 6 Q. B. 77.

(*u*) *Lomax* v. *Buxton*, L. R. 6 C. P. 107.

was one of law, not of fact; the words were omitted as superfluous and misleading, inasmuch as the Court or a jury were by that rule sometimes compelled to find fraudulent intent, where, in fact, there was no such intent (*x*).

Circumstances of particular case must be considered.

In determining the conclusion of law whether a mortgage security given by a person who afterwards becomes bankrupt is impeachable as a "fraudulent conveyance," the facts of the particular case must be examined. "In each case, looking at all the circumstances, you have to answer these questions: Does the assignment include all the property, or is there a substantial exception? Is it wholly to secure a pre-existing debt? And, if there is a further advance, is it a substantial one?" (*y*). The test is whether the lender made such advance to enable the debtor, if a trader, to carry on his business, and with a reasonable belief that the advance would have that effect (*z*).

Mortgage of whole of debtor's property to secure existing debt is void.

A mortgage of the whole of the debtor's property, or of the whole with a colourable exception, whether for the benefit of a particular creditor or creditors to the exclusion of others (*a*), or for the benefit of his creditors generally (*b*) to secure an existing debt or debts, is an act of bankruptcy, and void accordingly as against the trustee.

Motives of parties immaterial.

Such a mortgage in favour of a particular creditor or several creditors is void, though no fraudulent motive on the part of any of the parties is proved, as the fraudulent intent will be imputed to the mortgagee from the necessary and obvious result of the transaction being to defeat or delay other creditors (*c*); and it makes no difference in this respect whether the mortgagor is a trader or non-trader (*d*).

Notice of act of bankruptcy.

The knowledge by the creditor that the assignment comprises

(*x*) *Re Wood*, L. R. 7 Ch. 302, at p. 307.

(*y*) *Exp. King*, *Re King*, 2 Ch. D. 256, at p. 262. See *Admor.-Gen. of Jamaica* v. *Lascelles*, (1894) A. C. 135, at p. 139.

(*z*) *Exp. Johnson*, 26 C. D. 338; *Admor.-Gen. of Jamaica* v. *Lascelles*, (1894) A. C. 135.

(*a*) *Re Wood*, L. R. 7 Ch. 302; *Exp. Trevor*, 1 Ch. D. 297; *Re Jukes*, (1902) 2 K. B. 58. See also *Woodhouse* v. *Murray*, L. R. 4 Q. B. 27; *Re Nurse, Exp. Foxley*, L. R. 3 Ch. 515.

(*b*) Bankruptcy Act, 1883, s. 4 (a), *ante*, p. 596. See *Re Wood*, *sup.*

(*c*) *Exp. Ellis*, 2 Ch. D. 797, C. A. See *Young* v. *Fletcher*, 3 H. & C. 732, *post*, p. 601 (which was a case of a mortgage of part only of the debtor's property to secure an existing debt, but it appeared that the mortgagee was aware that the result would be to delay creditors).

(*d*) *Re Wood*, L. R. 7 Ch. 302. See *Exp. Luckes*, 26 L. T. 113, L.JJ.; *Exp. Hawker*, L. R. 7 Ch. 214.

all the debtor's property does not necessarily affect him with notice of the act of bankruptcy (*e*).

Consideration of forbearance.

A mortgage of substantially the whole of a debtor's property to secure an existing debt may be saved if some fair present equivalent, not necessarily in money, be given. Thus if a valid charge is paid off and the estate is thus relieved from existing liability to some other creditor (*f*), or if the creditor has supplied the debtor with goods on credit (*g*), or has given further time to the debtor (*h*). But the transaction will not be saved by reason of its being given in consideration of forbearance to seize under an execution or under a previous bill of sale (*i*).

Mortgage of part of property for subsisting debt valid.

A *bonâ fide* mortgage by a debtor of part only of his property, given to secure a subsisting debt, is *primâ facie* not a fraudulent conveyance liable to be set aside in the event of the mortgagor's subsequent bankruptcy (*k*).

Exception when mortgage made in fraud of creditors.

But the mere fact that the property included in a mortgage is only a part, and not the whole with a merely colourable exception, of the mortgagor's property, will not be conclusive as to the *bona fides* of the transaction. The difference in this respect between a mortgage of substantially the whole of a debtor's property and a mortgage of a portion of the property, appears to be that in the former case the burden of proving *bona fides* lies on the debtor; in the latter case the burden is shifted to the bankruptcy trustee (*l*).

Mortgages of part only, not being substantially the whole, of a debtor's property, if liable to be set aside as fraudulent conveyances, will for the most part, but not invariably, be found to be also void as fraudulent preferences within sect. 48 of the Bankruptcy Act, 1883.

So a mortgage by a trader of less than a moiety of the whole of his property was upheld, no actual fraud being proved, although the effect of enforcing the security would have been to stop his business (*m*).

In a later case, where the proportions of the property included

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(*e*) *Re Hauxwell*, 23 Ch. D. 626. But see *Re Jukes*, (1902) 2 K. B. 58.

(*f*) *Whitmore* v. *Claridge*, 33 L. J. Q. B. 87.

(*g*) *Exp. Sheen*, 1 Ch. D. 561.

(*h*) *Philps* v. *Hornstedt*, 1 Ex. D. 62. But see *Exp. Cooper*, 10 Ch. D. 313.

(*i*) *Exp. Cooper, Re Baum*, 10 Ch. D. 313; *Exp. Payne, Re Cross*, 11 Ch. D. 539.

(*k*) *Carr* v. *Burdiss*, 1 C. M. & R. 443.

(*l*) *Abbott* v. *Burbage*, 2 Bing. N. C. 444; *Chase* v. *Goble*, 2 M. & G. 930.

(*m*) *Young* v. *Waud*, 8 Exch. 221.

in and excepted from the mortgage were similar, a contrary decision was made, but in that case the greater part of the excepted property consisted of the equity of redemption in the property mortgaged, which was not legally available for the other creditors, and the remainder was of merely nominal value; moreover, it appeared that the mortgagee was well aware that the necessary result of enforcing the security would be to stop the business and so delay the creditors (*n*).

Effect of pressure by creditor.

Pressure by a creditor may be material as tending to show that the debtor's intention in mortgaging part of his property was to escape from the pressure and not to defraud his creditors (*o*). But no amount of pressure will save the deed if fraudulent intent is proved in the case of a partial disposition (*p*).

The same rule will apply with greater force where the disposition includes substantially the whole of the debtor's property. So where a trader, under pressure on the part of certain creditors, mortgaged substantially the whole of his property to secure debts owing to them, and it appeared that the effect of the mortgage would be to stop his trade, it was held that the mortgage was void as against the assignees in the debtor's bankruptcy as a fraudulent conveyance, inasmuch as the intention to defeat or delay the creditors must be imputed to the bankrupt, although the deed must be taken to have been the unwilling act of the bankrupt executed under pressure, so as to prevent it from being a fraudulent preference (*q*).

If the security is obtained by pressure, it will not, in the absence of collusion (*r*), be a fraudulent preference, although the creditor was aware of the insolvency of the debtor (*s*); and although a transaction, under which a power of sale is given to a creditor practically over all the debtor's property, may be within the Bankruptcy Act, 1883, s. 4 (*t*), yet, where the trader receives a fair equivalent, the transaction is not void under the bankrupt law, though the trader assigns his whole property (*u*).

(*n*) *Young* v. *Fletcher*, 3 H. & C. 732.

(*o*) *Smith* v. *Timms*, 1 H. & C. 849.

(*p*) *Young* v. *Fletcher*, *sup.*; *Exp. Pearson*, L. R. 8 Ch. 667.

(*q*) *Exp. Bailey*, *Re Barrell*, 3 De G. M. & G. 534. See *Exp. Reader*, *Re Wrigley*, L. R. 20 Eq. 763; *Tomkins* v. *Saffery*, 3 App. Ca. 213.

(*r*) *Belcher* v. *Jones*, 2 M. & W. 258.

(*s*) *Smith* v. *Pilgrim*, 2 Ch. D. 127, C. A.; *Exp. Hall*, *Re Cooper*, 19 Ch. D. 580, C. A.

(*t*) *Philps* v. *Hornstedt*, 1 Ex. D. 62, C. A. See *Exp. Norton*, L. R. 16 Eq. 397.

(*u*) *Ibid.*; *Mercer* v. *Peterson*,

Colourable exceptions.

It is well settled that merely colourable exceptions of part of a debtor's property will not render valid an assignment of what is substantially the whole of his property (*x*).

Test is, whether exception is sufficient to save insolvency.

The general test as to whether an exception is colourable or not appears to be whether or not the exception will save the assignment, if enforced, from causing an immediate insolvency. In the case of a trader it will generally be inferred that the result of an assignment will be to produce insolvency if the result actually is to stop his business (*y*). In the case of a non-trader, this test is, of course, not applicable, and the general test must be applied having regard to the circumstances of each particular case.

What are sufficient exceptions.

The exception will not be sufficient to save an assignment if the excepted part of the property is such as would not pass to the trustee nor be capable of being taken in execution. So the exception of a pension which would not pass to an assignee is not substantial (*z*); nor is the exception of tenant right under a lease, which is a mere contingent right (*a*). In estimating whether a bill of sale comprises the whole of a debtor's property, the value of his book debts is to be taken into account (*b*). It is sufficient if the debtor is left in possession of sufficient materials to carry on his trade (*c*). If the mortgage passes all the stock in trade, so that he cannot carry on his business, it is held void, although he has other property besides his stock in trade (*d*).

Mortgage void if it withdraws all debtor's property from legal remedies of creditors.

But though the effect of a mortgage of the whole, or of substantially the whole, of a debtor's property is not to produce insolvency in the mortgagor, it may be liable to be set aside in bankruptcy if its result is to defeat or delay the creditors of the mortgagor. So, the fact that the amount secured is much less

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L. R. 2 Ex. 301; *S. C.*, L. R. 3 Ex. 104. And see *Exp. Cooper, In re Baum*, 10 Ch. D. 313, C. A.

(*x*) *Worsley* v. *De Mattos*, 1 Burr. 467; *Hale* v. *Allnutt*, 25 L. J. C. P. 267; *Smith* v. *Timms*, 1 H. & C. 849; *Pennell* v. *Dawson*, 18 C. B. 355; *Pennell* v. *Reynolds*, 11 C. B. N. S. 716.

(*y*) *Young* v. *Ward*, 8 Ex. Ch. 234; *Leake* v. *Young*, 5 E. & B. 255; *Young* v. *Fletcher*, 3 H. & C. 732; *Exp. Bland*, 6 De G. M. & G. 757; *Smith* v. *Cannan*, 2 E. & B. 35; *Exp. Clater, Re Wilkinson*, 48 L. T. 648.

(*z*) *Exp. Hawker, Re Keely*, L. R. 7 Ch. 214.

(*a*) *Exp. Dann*, 17 Ch. D. 26, C. A.

(*b*) *Exp. Bolland*, 41 L. J. Bky. 60; *Exp. Burton*, 13 Ch. D. 102, C. A.

(*c*) *Johnson* v. *Fesemeyer*, 3 De G. & J. 13; *Goodricke* v. *Taylor*, 2 De G. J. & S. 135; *Smith* v. *Cannan*, 2 E. & B. 35.

(*d*) *Young* v. *Fletcher*, 3 H. & C. 732; *Re Rayment*, 80 L. T. 807.

in amount than the value of the property assigned will not save the security, unless saved by sect. 49 from being void as a fraudulent conveyance, inasmuch as the vesting of the legal estate in the mortgagee prevents the equity of redemption from being seized in execution, and thus takes the whole of the debtor's property out of the reach of the common law remedy of the creditors (*e*).

Mortgage by partner of all his separate property.

It was held in one case that an assignment by a partner in an insolvent firm of all his separate property was a fraudulent conveyance, though the assignment did not include the partnership assets, which were, of course, seizable in execution on a judgment against the partner (*f*); and conversely, a mortgage by a partner in an insolvent firm of the partnership property as a security for his separate debt is void, as fraudulent as against the creditors of the partnership (*g*).

An assignment of what was, in fact, the whole of a trader's property, was held to be a fraudulent conveyance, though he was not aware that he was assigning all his property, but intended to except his furniture and stock in trade, which had been taken in execution without his knowledge (*h*).

Bankruptcy Act, 1883, s. 4.

iii.—Fraudulent Preference.—The avoidance of conveyances on the ground of fraudulent or voluntary preference is now regulated by the Bankruptcy Act, 1883, s. 4, sub-s. (c), and s. 48 (*i*).

Principle of the doctrine of fraudulent preference.

The doctrine of fraudulent preference has been established for the benefit of creditors generally, and not for the benefit of any individual creditor. And accordingly, where the result of recovering property alleged to have been delivered or transferred would be to benefit not the creditors generally, but a particular creditor who claims a security on the property, the trustee ought not himself to take proceedings or allow proceedings to be taken in his name for the recovery of the property on the ground of fraudulent preference (*k*).

Statutory recognition of the doctrine.

The former Bankruptcy Acts, prior to that of 1869 (*l*), did not contain any express mention of "fraudulent preference,"

(*e*) *Smith* v. *Cannan*, 2 E. & B. 35; *Re Wood*, L. R. 7 Ch. 302.

(*f*) *Exp. Trevor*, *Re Burghardt*, 1 Ch. D. 297.

(*g*) *Exp. Snowball*, *Re Douglas*, L. R. 7 Ch. 534.

(*h*) *Exp. Bailey*, 3 De G. M. & G. 534.

(*i*) See sect. 4 set out *ante*, p. 596.

(*k*) *Exp. Cooper*, *Re Zucco*, L. R. 10 Ch. 510.

(*l*) 32 & 33 Vict. c. 71.

though the term was frequently used in bankruptcy proceedings to signify voluntary assignments made by persons in insolvent circumstances, or in contemplation of insolvency or bankruptcy, for the benefit of any creditor in particular or creditors generally. The term "fraudulent preference" was first defined by the Act of 1869 in language similar to that of the present Act, except so far as will be presently pointed out.

The Bankruptcy Act, 1883 (*m*), enacts as follows:—

Avoidance of preferences in certain cases.

Sect. 48. "(1.) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered (*n*) by any person unable to pay his debts as they become due from his own money, in favour of any creditor or any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

"(2.) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt."

Protection of *bonâ fide* transactions for value without notice.

Sect. 49. "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of bankruptcy—

(c) Any conveyance or assignment by the bankrupt for valuable consideration;

(d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration: Provided that both the following conditions are complied with, namely—

(1) The payment, delivery, conveyance, assignment, contract, dealing or transaction, as the case may be, takes place before the date of the receiving order; and

(2) The person (other than the debtor) to, by or with whom the payment, delivery, conveyance, assignment, contract, dealing or transaction was made, executed, or entered into, has not, at the time of the payment, delivery, conveyance, assignment, contract, delivery or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time."

How far earlier decisions apply.

Having regard to the definition introduced by the Act of 1869, and repeated with modifications by the Act of 1883, the decisions under the earlier Bankruptcy Acts must be consulted

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(*m*) 46 & 47 Vict. c. 52. And see 53 & 54 Vict. c. 71, s. 20.

(*n*) See *Exp. Lancaster*, 25 Ch. D. 311, C. A.

with some caution (*o*). Such decisions may serve as a guide, but must not be substituted for the words of the Act (*p*).

Voluntary assignments by insolvents under the old law.

The following decisions were made under the old Acts. An assignment or payment by an insolvent was not voluntary, if made for a *bonâ fide* consideration (*q*); or under pressure on the part of the creditor (*r*); or even without pressure or threat, if there were a *bonâ fide* demand on the part of the creditor (*s*); if, in fact, anything were done by the creditor to interfere with or control the debtor's will (*t*); and the circumstance of the grantor being the grantee's solicitor made no difference in this respect (*u*). Though the debtor may have desired to favour the creditor, yet if there was a *bonâ fide* application, and the act in any degree proceeded from such application, it was not entirely voluntary, and therefore not fraudulent (*x*). There must not have been any collusion: as if the creditor acted on a hint from his debtor as to his circumstances (*y*). *Secus*, if the creditor derived his information from a third person (*z*).

The security was protected, though the debt was not actually payable (*a*); but the demand must have been made by someone entitled to make it (*b*), as by a guarantor (*c*), and the transaction must have been in the usual course of business (*d*); but knowledge by the creditor of the insolvent state of the debtor's affairs was held to be immaterial where the question was merely as to the voluntary character of the act (*e*). Where the security contained provisions for the benefit of third persons, the demand

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(*o*) Per Lord Cairns, C., in *Butcher* v. *Stead*, L. R. 7 H. L. 839, at p. 846.

(*p*) *Exp. Griffith, Re Wilcoxon*, 23 Ch. D. 69, C. A.

(*q*) *Arnell* v. *Bean*, 8 Bing. 87. See *Exp. Cox, Re Reed*, 1 Ch. D. 302.

(*r*) *Davies* v. *Acocks*, 2 C. M. & R. 461; *Knight* v. *Ferguson*, 5 M. & W. 389.

(*s*) *Mogg* v. *Baker*, 4 M. & W. 348; *Reynard* v. *Robinson*, 9 Bing. 717; *Belcher* v. *Prittie*, 10 Bing. 408; *Van Casteel* v. *Booker*, 2 Exch. 691; *Ogg* v. *Shuter*, L. R. 10 C. P. 165.

(*t*) *Vacher* v. *Cocks*, 1 B. & Ad. 152; *Strachan* v. *Barton*, 11 Exch. 650; *Johnson* v. *Fesemeyer*, 3 De G. & J. 13; *Exp. London and County Bank*, L. R. 16 Eq. 391.

(*u*) *Johnson* v. *Fesemeyer*, *sup.*

(*x*) *Brown* v. *Kempton*, 19 L. J. C. P. 169; *Edwards* v. *Glyn*, 2 E. & E. 29; *Bills* v. *Smith*, 34 L. J. Q. B. 68.

(*y*) *Singleton* v. *Butler*, 2 B. & P. 283.

(*z*) *Belcher* v. *Jones*, 2 M. & W. 258.

(*a*) *Thompson* v. *Freeman*, 1 T. R. 155; *Hartshorn* v. *Sladden*, 2 B. & P. 584; *Crosby* v. *Crouch*, 11 East, 256; *Strachan* v. *Barton*, 11 Exch. 650.

(*b*) *Belcher* v. *Prittie*, 10 Bing. 408.

(*c*) *Edwards* v. *Glyn*, 2 E. & E. 29.

(*d*) *Abell* v. *Daniell*, Moo. & M. 370.

(*e*) *Davison* v. *Robinson*, 3 Jur. N. S. 791.

did not deprive those provisions of their voluntary character (*f*); nor had the holder of a collateral security the benefit of the demand (*g*). So a transfer of a *part* of a trader's goods in satisfaction of *a pre-existing debt,* if made voluntarily and in contemplation of bankruptcy, was held void as against the assignees under a subsequent adjudication (*h*).

The question of fraudulent preference depended upon the intention of the bankrupt; if such intention was to defeat the distribution of the property under the bankruptcy laws, the circumstance of there being a demand by the particular creditor would go for nothing; but if the moving cause was the solicitation of the creditor, and not the desire of the bankrupt himself to defeat the general distribution, that was no fraudulent preference (*i*).

Alterations introduced by the Bankruptcy Act, 1883.

By sect. 48 of the Act of 1883, two important alterations are introduced in the law relating to conveyances, &c. on the ground of fraudulent preference.

Limit of time for avoidance.

First, by sub-sect. (1), a conveyance by a debtor is now void, as a fraudulent preference, if made within three months before the presentation of a petition on which the debtor is adjudged bankrupt, and not, as under the Act of 1869, if made within three months before adjudication. Accordingly, a mortgage by a debtor of part or even of the whole of his property, will, on the expiration of three months without the presentation of a petition, be unimpeachable on the ground of fraudulent preference.

Restriction of immunity.

Secondly, by sub-sect. (2), the immunity afforded by the Act of 1869 is restricted so as no longer to protect a purchaser from, or incumbrancer of, the debtor in good faith and for valuable consideration, but only a "person making title in good faith and for valuable consideration through or under a creditor of the bankrupt." A creditor who takes security for his debt in ignorance that he is being preferred is therefore no longer within the statutory protection (*k*).

Burden of proof.

It was held, under the Act of 1869, and would probably be held under the present Act, that the onus of proving good faith

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(*f*) *Morgan* v. *Horseman,* 3 Taunt. 241.

(*g*) *Marshall* v. *Lamb,* 5 Q. B. 115.

(*h*) *Bevan* v. *Nunn,* 9 Bing. 107.

(*i*) Per Parke, B., in *Van Casteel* v. *Booker,* 18 L. J. Ex. 9, 14, 20.

(*k*) The effect of sect. 48, sub-sect. (2), is thus to abrogate the decision of the House of Lords in *Butcher* v. *Stead,* L. R. 7 H. L. 839.

and valuable consideration lies on the person who seeks to support a conveyance which would otherwise be void as a fraudulent preference (*l*). But under the Act of 1883 the onus lies on the trustee to prove that the payment was made by the bankrupt with a view to prefer the particular creditor (*m*).

Intention to prefer, not creditor's knowledge material.

An important result of the restriction of the immunity to persons deriving title under a purchaser or incumbrancer of the debtor, is to revive the rule of law, prior to the Act of 1869, that the question whether a particular transaction amounts to a fraudulent preference depends on the intention of the debtor to prefer, and not on the motives or privity of the creditor (*n*).

In other respects the definition of fraudulent preference given by the Act of 1883 is identical with that given by the Act of 1869.

Whether contemplation of bankruptcy is material.

The definition does away with the necessity of there being a contemplation of bankruptcy by the debtor (*o*), and it substitutes the fact of the debtor being unable to pay his debts, as they become due, out of his own money, and the presentation of a petition on which the debtor is adjudged bankrupt within three months after the transaction, for "the contemplation of bankruptcy," required under the former law (*p*). It is apprehended, however, that the fact that a mortgage was made by a debtor in contemplation of bankruptcy would still be material in determining whether the instrument is void as a fraudulent preference (*q*).

Surety may be creditor.

To constitute a fraudulent preference the payment must be made to the person whom it is sought to prefer; it is not enough that it is paid to a creditor. Consequently, though payment to a surety may be a fraudulent preference, it is otherwise if the payment is made to a creditor with the view of relieving the surety for the debt from liability (*r*).

Effect of pressure by creditor.

In order to constitute a fraudulent preference, the mortgage or other conveyance must still be voluntary, and practically the old law, requiring the act to be the spontaneous act of the

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(*l*) See *Exp. Tate*, 35 L. T. 531. See also Williams on Bankruptcy, 7th ed. p. 240.

(*m*) *Re Laurie, Exp. Green*, 67 L. J. Q. B. 431.

(*n*) *Davison* v. *Robinson*, 3 Jur. N. S. 791. See Williams on Bankruptcy, 7th ed. p. 240.

(*o*) *Exp. Norton, Re Golden*, L. R. 16 Eq. 398, 408.

(*p*) See Williams on Bankruptcy, 7th ed. p. 236.

(*q*) *Exp. Tempest*, L. R. 6 Ch. 70; *Exp. Blackburn, Re Cheesebrough*, L. R. 12 Eq. 358, 363.

(*r*) *Re Blackpool Motor Car Co.*, (1901) 1 Ch. 77, and cases there cited and considered.

debtor, applies (*s*). The word "voluntary," in the technical sense which it had under the old law, means practically the same thing as "with a view of giving such creditor a preference over the other creditors" (*t*). If there is pressure, or a request by the creditor, the act is not fraudulent; the Court must be satisfied that the debtor's substantial motive was to prefer the creditor (*u*). It is not necessary that it should be the sole motive (*x*). If preference of a particular creditor or creditors is not the main or dominant motive, it is immaterial that the actual effect of the transaction is to prefer the secured creditor to the other creditors (*y*). If, however, the transaction is fraudulent in its inception, no pressure by the creditor will support it (*z*). Though pressure is an answer to a case of fraudulent preference it is no answer to a case of collusion (*a*).

Spontaneity necessary to fraudulent preference.

A disposition will not generally be held to have the spontaneity necessary to constitute fraudulent preference where it is made in pursuance of a previous contract (*b*); or to make good a breach of trust (*c*); or to avoid a distress (*d*); or under threat of legal proceedings to enforce payment (*e*); or under the belief, though mistaken, that he was legally bound to make it (*f*); but it is not enough to show that the debtor acted under a sense of moral obligation (*g*).

Substituted security.

Where the owner of certain furniture gave a bill of sale thereon to secure a *bonâ fide* advance, but subsequently, on discovering that the bill was void, gave a fresh bill, it was held that the intention was to correct the mistake in the first bill, and

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(*s*) *Exp. Bolland, Re Cherry*, L. R. 7 Ch. 24; *Exp. Halliday*, L. R. 8 Ch. 283; *Smith* v. *Pilgrim*, 2 Ch. D. 127.

(*t*) *Exp. Bolland, sup.*, per Mellish, L.J., p. 27.

(*u*) *Exp. Topham*, L. R. 8 Ch. 616; *Exp. London and County Bank*, L. R. 16 Eq. 391.

(*x*) *Exp. Hill*, 23 Ch. D. 695, C. A.

(*y*) *Exp. Taylor, Re Goldsmid*, 18 Q. B. D. 295, C. A.; *Re Lake, Exp. Dyer*, (1901) 1 K. B. 710, C. A.

(*z*) *Exp. Reader, Re Wrigley*, L. R. 20 Eq. 763. See *Exp. Arnold, Re Wright*, 3 Ch. D. 70; *Exp. Saffery, Re Cooke*, 4 App. Ca. 213; *Exp. Bolland, Re Gibson*, 8 Ch. D. 230.

(*a*) *Edison Electric Co.* v. *Westminster, &c. Co.*, (1897) A. C. 193.

(*b*) *Exp. Hodgkin, Re Softley*, L. R. 20 Eq. 746; *Hermoux* v. *Harbord*, 14 T. L. R. 243.

(*c*) *Exp. Stubbins, Re Wilkinson*, 17 Ch. D. 58, C. A.; *Sharp* v. *Jackson*, (1899) A. C. 419; *Re Lake, Exp. Dyer*, (1901) 1 K. B. 710, C. A.

(*d*) *Mavor* v. *Croome*, 1 Bing. 261.

(*e*) *Dixon* v. *Baldwin*, 5 East, 175; *Murray* v. *Pinkett*, 12 Cl. & F. 764; but see *Exp. Hall, Re Cooper*, 19 Ch. D. 580, per Jessel, M.R.

(*f*) *Re Vautin, Exp. Saffery* (No. 2), (1900) 2 Q. B. 325.

(*g*) *Re Blackburn & Co.*, (1899) 2 Ch. 725; cf. *Re Lake, sup.*

this negatived any intention to prefer, and that the security was valid (*h*).

Security pursuant to previous contract.

Where, upon an advance, an agreement is made for a bill of sale at a subsequent period, the bill of sale will be treated as having been executed at the date of the agreement (*i*), unless the giving of the bill of sale is purposely postponed till the situation of the trader is hopeless, or where the bill of sale is not to be given "until the lender has lost confidence in the borrower," or "until the lender requires it" (*k*); but in such case the promise to give the future bill of sale to be effectual must be absolute (*l*); and the *onus probandi* is upon the person who sets up the prior agreement to prove not only that the agreement did exist in fact, but that it was in all respects a *bonâ fide* agreement(*m*), and there must be a very clear explanation why the giving of the bill of sale was delayed (*n*); and the device of renewing the bill of sale from time to time will not avail (*o*). It would seem that the requirements of the Bills of Sale Act, 1882 (*p*), render an agreement to give a bill of sale altogether inoperative as a security, but the agreement might be material as evidence of the good faith of a bill of sale given in pursuance of the agreement, so as to prevent the bill from being set aside in bankruptcy.

Completion of previous security.

If a *bonâ fide* deposit be made, and the debtor afterwards, and in immediate contemplation of bankruptcy, execute a conveyance of the legal estate to the creditor in completion of the mortgage, it is a good legal title, and will be protected by the equitable title previously obtained (*q*). And without such conveyance the depositee was entitled, even at law, to the rents, as against the assignees in bankruptcy of the depositor, since such assignees only took what the bankrupt or insolvent was entitled to at law and in equity (*r*). Where a landlord advanced a part

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(*h*) *Re Tweedale, Exp. Tweedale*, (1892) 2 Q. B. 216.

(*i*) *Mercer* v. *Peterson*, L. R. 3 Ex. 104; *Jones* v. *Harber*, L. R. 6 Q. B. 77; *Exp. Izard*, L. R. 9 Ch. 271; *Exp. Hodgkin, Re Softley*, L. R. 20 Eq. 746; *Re Jackson, Exp. Hall*, 4 Ch. D. 682.

(*k*) *Exp. King*, 2 Ch. D. 256, C. A.; *Exp. Burton*, 13 Ch. D. 102, C. A.; *Exp. Kilner*, 13 Ch. D. 245, C. A.

(*l*) *Exp. Fisher*, L. R. 7 Ch. 644.

(*m*) *Exp. Kilner*, 13 Ch. D. 245, C. A.

(*n*) *Ibid.*; *Exp. Hauxwell, Re Hemingway*, 23 Ch. D. 638.

(*o*) *Exp. Cohen*, L. R. 7 Ch. 20; *Exp. Stevens*, L. R. 20 Eq. 786; but see *Re Jackson, Exp. Hall*, 4 Ch. D. 682. And see *sup.* p. 256.

(*p*) 45 & 46 Vict. c. 43. See *ante*, p. 239.

(*q*) Per Lord Eldon in *Hiern* v. *Mill*, 13 Ves. 114.

(*r*) *Garry* v. *Sharratt*, 10 B. & Cr. 716; *Sumpter* v. *Cooper*, 2 B. & Ad. 223.

of the purchase-money on the sale of a sub-lease by his lessee, and the sub-lease was immediately on its execution deposited with the landlord, he was held to have a lien by virtue of the deposit against the assignees of the sub-lessee, though he was at the time an undischarged bankrupt, on the ground that the sub-lease and deposit were simultaneous transactions (*s*).

An equitable mortgage for securing a voluntary bond debt is good against a subsequent bankruptcy, unless there be fraud or insolvency at the time (*t*).

Notice to secured creditor of impending bankruptcy.

Inasmuch as a bill of sale transfers the property in the mortgaged chattels to the holder, it is no fraudulent preference for the grantor to give to the holder notice of impending bankruptcy, in consequence of which the holder seizes and sells the chattels (*u*).

So mere delay to register or take possession will not avoid a bill of sale in the absence of any intention to defeat or delay creditors, even though the registration be effected just before bankruptcy (*x*).

Trust deed by partner.

A trust deed by a partner assigning all his property for his separate creditors is a fraudulent preference (*y*), though his partnership assets are not specifically mentioned in the deed (*z*). The creditor cannot apply the principle of consolidation (*a*).

Attornment clause.

An attornment clause in a mortgage, so framed as to amount to a mere device to enable the mortgagee to obtain thereby a preference over the other creditors on bankruptcy, is a fraudulent preference (*b*).

Licence to seize.

So a licence in a builder's contract to seize materials on bankruptcy may be void (*c*).

Payments after arrest.

No payment or composition made or security given after arrest made under sect. 25 of the Bankruptcy Act, 1883, is exempt from the provisions of the Act relating to fraudulent preferences (*d*).

When proceedings are to be taken.

When the only result of recovering property delivered to a

(*s*) *Meux* v. *Smith*, 11 Sim. 410. And see *Bird* v. *Philpott*, (1900) 1 Ch. 822.

(*t*) *Meggison* v. *Foster*, 2 Y. & C. C. C. 336.

(*u*) *Exp. Symmons, Re Jordan*, 14 Ch. D. 693, C. A.

(*x*) *Morris* v. *Morris*, (1895) A. C. 625.

(*y*) *Exp. McLean*, 24 L. T. 144.

(*z*) *Exp. Trevor*, 1 Ch. D. 297.

(*a*) *Exp. Hodgkin, Re Softley*, L. R. 20 Eq. 746.

(*b*) *Exp. Williams, Re Thompson*, 7 Ch. D. 138, C. A.; *Exp. Jackson, Re Bowes*, 14 Ch. D. 725, C. A.

(*c*) *Exp. Jay, Re Harrison*, 14 Ch. D. 19, C. A.; see *Re Weibking*, (1902) 1 K. B. 713.

(*d*) See also the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 7.

creditor by way of fraudulent preference would be to benefit a secured creditor, and not the creditors generally, the trustee ought not to take proceedings or lend his name for that purpose (*e*).

Securities given pending a composition.

After composition resolutions have been passed and registered (*f*), a debtor cannot, before completion of the composition, enter into a valid agreement with a creditor who is bound by the resolutions to pay him his debt in full, even though the agreement is made for valuable consideration, such as an agreement by the creditor to give fresh credit to the debtor (*g*).

Secret securities.

Securities given by a compounding debtor to a creditor before the passing of the composition resolution without communication to the other creditors, by which the creditor obtains preference over them, are void (*h*).

Agreement with surety.

It makes no difference that the fraudulent creditor is surety for the composition (*i*); and a release contained in the composition deed is binding upon the fraudulent creditor (*k*).

Agreement with third party.

So, also, a similar agreement with a third person would be void. So where a banker, after proceedings for liquidation had been commenced against a customer, took from the customer's brother, without the knowledge of the other creditors, a guarantee that the loss to the banker should not exceed 2,000*l*., so as to induce the latter not to oppose the composition, it was held that the arrangement could not be sustained (*l*).

Where, however, the goods of a debtor were, by the terms of a composition, left at his disposal, a deposit of the goods as security with a person who guaranteed an instalment of the composition, was upheld (*m*).

Recovery of amount secured.

The trustees of the bankrupt can recover the amount of the fraudulent security; and the debtor also can recover the amount from the creditor if he is compelled to pay the fraudulent

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(*e*) *Willmott* v. *London Celluloid Co.*, 34 C. D. 147.

(*f*) Compositions are now regulated by sect. 3 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

(*g*) *Exp. Barrow, Re Andrews*, 18 Ch. D. 464, C. A.

(*h*) *Mallalieu* v. *Hodgson*, 16 Q. B. 711; *Dauglish* v. *Tennant*, L. R. 2 Q. B. 49; *Exp. Phillips, Re Harvey*, 36 W. R. 567; *Exp. Milner*, 15 Q. B. D. 605.

(*i*) *Wood* v. *Barker*, L. R. 1 Eq. 139; *Bissell* v. *Jones*, L. R. 4 Q. B. 49.

(*k*) *Exp. Oliver*, 4 De G. & J. 354; *Mallalieu* v. *Hodgson*, 15 Jur. 817, Q. B.

(*l*) *McKewan* v. *Sanderson*, L. R. 20 Eq. 65.

(*m*) *Exp. Burrell, Re Robinson*, 1 Ch. D. 537, C. A.; but see *Exp. Allard, Re Simons*, 16 C. D. 505.

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security in the hands of a third party (*n*), and even if he has paid the money under the fraudulent agreement to the creditor himself (*o*).

Security to particular creditor in composition.

Where a security is given to some creditors for more than the composition, the executing creditors are not bound by the composition (*p*); and the secured creditor can neither recover upon the fraudulent security nor share in the composition (*q*). Indeed, it would seem that a creditor, who has practised a fraud of this sort on the other creditors, will not, if the composition is not paid and the debtor becomes bankrupt, be allowed to prove under the bankruptcy for either his original debt or the composition (*r*).

And where a debtor obtained the consent of one of his creditors to a composition by a secret promise to pay his debt in full, which promise he performed and afterwards became bankrupt, the creditor was not allowed to prove a new debt, without first deducting the sum so paid to him beyond the former composition (*s*).

Extent of protection of sect. 49.

The protection afforded by sect. 49 extends to a payment in good faith and for valuable consideration, although the transaction would otherwise be a fraudulent preference and an act of bankruptcy (*t*).

Mortgage to secure present advance.

Mortgages, whether of the whole of a debtor's property or only of a part thereof, given to secure an actual present advance only, are clearly protected by sect. 49 of the Act, provided they are given previously to the date of a receiving order made against the mortgagor, and that the mortgagee has not notice of any available act of bankruptcy (*u*). And this is so where the advance is made on the same day as the receiving order, though an hour or two earlier (*x*). But though a contract to make

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(*n*) *Horton* v. *Riley*, 11 M. & W. 492.

(*o*) *Horton* v. *Riley*, *sup.*; *Atkinson* v. *Denby*, 7 H. & N. 934; *Lensberg's Policy*, 7 Ch. D. 650.

(*p*) *Dauglish* v. *Tennant*, L. R. 2 Q. B. 49; *Cullingworth* v. *Lloyd*, 2 Beav. 385; *Wood* v. *Barker*, L. R. 1 Eq. 139. See Robs. Bky. 249, ed. 4.

(*q*) *Howden* v. *Haigh*, 3 P. & D. 661.

(*r*) *Re Cross*, 4 De G. & S. 364, note.

(*s*) *Exp. Minton*, 1 M. & A. 440.

(*t*) *Exp. Blackburn*, W. N. (1884) 131, C. A.; *Shears* v. *Goddard*, (1896) 1 Q. B. 406.

(*u*) "Available act of bankruptcy" means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made. See sect. 168 of the Act of 1883.

(*x*) *The Thames*, 63 L. T. 353.

advances is protected, a payment thereunder does not necessarily share in such protection (*y*).

Notice.

The notice intended by the Act is actual notice of a complete act of bankruptcy (*z*).

Bonâ fide mortgage of whole property.

A *bonâ fide* sale by a trader of all his stock has long been held to be valid as against his trustee in bankruptcy, if the purchaser was ignorant of any fraudulent intention on the part of the trader (*a*), although the purchaser had knowledge that an execution is intended (*b*); and this principle was extended so as to render valid a *bonâ fide* assignment by way of mortgage of all a person's property to secure a present advance of which the mortgagor obtains, at the time, the full benefit (*c*). But where a creditor takes a transfer of substantially the whole of the debtor's property in payment of a past debt, with notice that there are other creditors, the transaction is a fraudulent preference (*d*).

There must be an equivalent (*e*), but if the security is for a present substantial advance, it is not necessary that the full value of the property be advanced (*f*).

It has been held that a *bonâ fide* sale for a present consideration will not be invalid as a fraudulent conveyance simply because the vendor intends to misapply the purchase-money or to abscond with the money, and so defraud his creditors, provided there is no fraudulent collusion on the part of the purchaser (*g*); and the same principle applies in the case of a mortgage (*h*).

Mortgage to secure existing debt and present advance.

A security given *bonâ fide* for a present advance will not be invalidated merely because it extends to secure an antecedent debt (*i*). But where a mortgage is given to secure an existing debt and also a further present advance, questions of complica-

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(*y*) *Powell* v. *Marshall*, (1899) 1 Q. B. 710, C. A.

(*z*) *Conway* v. *Nall*, 1 C. B. 643; *Bird* v. *Bass*, 6 Man. & Gr. 143.

(*a*) *Shears* v. *Goddard*, (1896) 1 Q. B. 406.

(*b*) *Wood* v. *Dixie*, 7 Q. B. 892; *Hale* v. *Metropolitan Saloon Omnibus Co.*, 4 Drew. 492.

(*c*) *Whitwell* v. *Thompson*, 1 Esp. 68. See *Cannan* v. *Denew*, 10 Bing. 292; *Fearnley* v. *Wright*, 6 Bing. N. C. 446.

(*d*) *Re Jukes*, (1902) 2 K. B. 58.

(*e*) *Hutton* v. *Cruttwell*, 1 E. & B. 15; *Bittlestone* v. *Cooke*, 6 E. & B. 296; *Harris* v. *Rickett*, 4 H. & N. 1; notwithstanding *Exp. Sparrow*, 2 De G. M. & G. 907.

(*f*) *Bittlestone* v. *Cooke*, *sup.*; *Allen* v. *Bonnett*, L. R. 5 Ch. 577.

(*g*) *Exp. Stubbins*, *Re Wilkinson*, 17 Ch. D. 58, C. A.

(*h*) *Re Colemere*, L. R. 1 Ch. 128.

(*i*) *Pennell* v. *Reynolds*, 11 C. B. N. S. 709, 722; *Shrubsole* v. *Sussams*, 16 C. B. N. S. 452; *Lomax* v. *Buxton*, L. R. 6 C. P. 107.

tion and difficulty sometimes arise as to the *bona fides* of the transaction.

Test of *bona fides* in such cases.

In the case of a trader, the validity of the transaction in bankruptcy will depend on whether the present advance is an equivalent by enabling the debtor to carry on his business. "The greatness or smallness of the advance made by the lender to the grantor, though to be taken into consideration, is not the real test. The real test is (whatever the amount of the advance compared with the antecedent debt was), did the lender intend that the advance should enable the debtor to carry on his business, and had he a reasonable ground for believing that it would enable him to do so?" (*k*). In such a case, the Court will not go into the intention of the debtor, nor consider that the result of the transaction was in fact that the business could not be carried on (*l*). So, conversely, the security will be bad if it appears on the evidence that the lender advanced his money with the purpose not of enabling the debtor to meet his engagements, and, if a trader, to continue his business, but of giving the lender a security in preference to other creditors (*m*).

If the creditor makes a present advance with the *bonâ fide* intention of enabling the debtor to carry on his business, the security will not be avoided, though the creditor is aware that the debtor intends to apply the money advanced to pay off an existing debt so as to relieve the estate from distress or other proceedings (*n*). So it was held that an actual sale of goods for money, the vendor intending to make a fraudulent preference with the purchase-money, was not a fraudulent transfer, although the purchaser knew of the transaction (*o*). It may be, in some cases, that the relief of a debtor's estate from distress or other pressure affords the only prospect of his being able to carry on his business.

Smallness of present advance.

A present advance, if made *bonâ fide* by a creditor to enable the debtor to carry on his business, need not be of large amount

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(*k*) *Exp. Johnson, Re Chapman*, 26 Ch. D. 338, C. A., per Cotton, L.J., at p. 346. See also *Exp. King, Re King*, 2 Ch. D. 256, C. A.; *Exp. Ellis*, 2 Ch. D. 797, C. A. These three cases were approved in *Admor.-Gen. of Jamaica* v. *Lascelles*, (1894) A. C. 135.

(*l*) *Exp. Johnson, Re Chapman*, 26 Ch. D. at p. 347.

(*m*) *Re Juleff, Exp. Hole*, W. N. (1883) 32; *Re Jukes*, (1902) 2 K. B. 58.

(*n*) *Whitmore* v. *Claridge*, 31 L. J. Q. B. 141; *Hutton* v. *Cruttwell*, 1 E. & B. 15; *Re Colemere*, L. R. 1 Ch. 128; *Exp. Reed, Re Tweddell*, L. R. 14 Eq. 586.

(*o*) *Exp. Stubbins, Re Wilkinson*, 17 Ch. D. 58, C. A.

in proportion to the subsisting debt or to the property mortgaged (*p*).

The smallness of the amount of the advance, however, affords strong evidence that the principal object of the parties in the whole transaction was not to enable the debtor to continue his trade but to secure to the creditor the repayment of his past advance (*q*).

Effect where material advance is made or agreed.

Conversely, it would seem that the fact that the further advance is of a substantial amount will be regarded as affording a presumption that the object was to enable the debtor to continue his trade, so as to support the mortgage (*r*). And if this is the case, the transaction will be supported, though no advance is actually made at the time, and though the security merely recites an agreement, but contains no covenant by the creditor, to make the further advances which are made afterwards (*s*).

Mere contemplation of advance not sufficient.

The fact that future advances were contemplated will not suffice, if there is no agreement to that effect (*t*), but it is sufficient if such agreement is contained in the assignment, although the mortgagee does not sign it (*u*).

The fact that further advances are afterwards made, but without any undertaking to make them, is not sufficient (*x*).

Secret promise to pay other creditors.

It is not a fair equivalent when the assignee makes a secret verbal promise to pay all the assignor's creditors, from whom it is studiously concealed, and who have no power to enforce it (*y*).

Test in case of traders.

In considering whether a trader receives an equivalent consideration for the security sufficient to enable him to carry on his business, the nature of the business may be taken into consideration, so that a present advance of small amount compared with the existing debt may be sufficient, in the case of a trader in a small way of business, to raise the presumption that the

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(*p*) *Exp. Threllfall, Re Williamson*, 35 L. T. 675; *Exp. Evans, Re Edwards*, 39 L. T. 364.

(*q*) *Exp. Fisher, Re Ash*, L. R. 7 Ch. 636, 644; *Exp. Ellis*, 2 Ch. D. 797, C. A. See *Exp. Winder*, 1 Ch. D. 290; *Exp. Greener*, 46 L. J. Bky. 76, C. A.

(*r*) *Exp. Sheen, Re Winstanley*, 1 Ch. D. 560, C. A.

(*s*) *Exp. Winder, Re Winstanley*, 1 Ch. D. 290.

(*t*) *Exp. Dann, Re Parker*, 17 Ch. D. 26, C. A.

(*u*) *Exp. Wilkinson, Re Berry*, 22 Ch. D. 788, C. A.

(*x*) *Exp. Cooper*, 10 Ch. D. 313, C. A.; *Exp. Dann, Re Parker*, 17 Ch. D. 26, C. A.

(*y*) *Exp. Chaplin, Re Sinclair*, 26 Ch. D. 319, C. A.

advance was intended and might reasonably be expected to enable him to carry on his business (*z*).

A mortgage of all a debtor's property given to secure an existing debt and further advances will be good, if it appears that the main object is to secure further advances in order that the borrower may be enabled to continue his business (*a*).

A bill of sale to secure an existing debt and a present advance will not necessarily be void as a fraudulent conveyance by reason of its including the whole of the debtor's present property and also property intended to be purchased with the moneys advanced, provided the transaction is made with the intent to enable the debtor to carry on his business (*b*).

Test in case of non-traders.

With regard to non-traders (*c*), no definite rule appears to have been laid down by any judicial decision. It would seem that the test that the creditor's intention in making the further advance is to enable the debtor to carry on his business for the benefit of his creditors, will be applied in the case of persons engaged in businesses which are not, strictly speaking, trades (*d*). But in the case of a person of no occupation, it is obvious that this test could not be applied, and it would seem difficult to show that the advance was made with the intention and reasonable expectation that the creditors would derive any benefit therefrom.

New security for debt barred by bankruptcy.

It is doubtful whether a new security given by a bankrupt to secure a debt from which he is released by the order of discharge can be enforced. It has, however, been held under the Act of 1869 that a promise to pay a debt discharged, without any new consideration, is void as *nudum pactum* (*e*), but such promise was held to be valid if there was any new consideration (*f*). Such promise, however, will not be valid if the bankrupt has not been discharged, as where a composition has not been completed (*g*).

Any bill of sale, warrant of attorney, or promissory note, merely for the old debt, was void under the repealed statutes (*h*);

(*z*) *Exp. Evans, Re Edwards*, 39 L. T. 364.

(*a*) *The Thames*, 63 L. T. 353; *Admor.-Gen. of Jamaica* v. *Lascelles*, (1894) A. C. 135. Cf. *Powell* v. *Marshall*, (1899) 1 Q. B. 710.

(*b*) *Exp. Hauxwell, Re Hemingway*, 23 Ch. D. 638, C. A.

(*c*) The Act of 1883 contains no definition of traders. Sect. 65 of the Bankruptcy Act, 1849, contained a definition of the term for the purposes of that Act.

(*d*) *Admor.-Gen. of Jamaica* v. *Lascelles*, (1894) A. C. 135.

(*e*) *Jones* v. *Phelps*, 20 W. R. 92; *Heather* v. *Webb*, 2 C. P. D. 1.

(*f*) *Jakeman* v. *Cook*, 4 Ex. D. 26.

(*g*) *Exp. Barrow, Re Andrews*, 18 Ch. D. 464, C. A.

(*h*) *Peakman* v. *Harrison*, L. R. 14 Eq. 484; *Exp. Hart*, 2 D. & L. 778; *Sheerman* v. *Thompson*, 11 A. & E. 1027; *Kidson* v. *Turner*, 27 L. J. Ex. 492.

but, if the new security were under seal, which requires no consideration, it would apparently have been valid. And it would seem, in the absence of judicial decision to the contrary, that such a security would be good at the present day.

Fraudulent preference.

iv. –Fraudulent Preference in Winding-up of Companies. —The Companies Act, 1908, contains the following provision:—

> Sect. 210. "Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference shall, if made or done by or against any company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly. For the purposes of this section the presentation of a petition for winding up, in the case of a winding up by or subject to the supervision of the Court, and a resolution for winding up, in the case of a voluntary winding up, shall be deemed to correspond with the act of bankruptcy in the case of an individual; any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors, shall be void to all intents."

This section is only intended to apply in the case of a winding-up, and, as in bankruptcy (*i*), for the benefit of the general creditors, and accordingly the doctrine of fraudulent preference cannot be taken advantage of by an individual creditor in a debenture-holders' action (*k*).

The Court looks at the dominant or real intention and not at the result (*l*). Where the intention is to discharge a legal obligation (*m*) or to repair a wrong (*n*) or to protect from exposure (*o*), the payment is not a fraudulent preference.

In order to avoid the security on the ground of fraudulent preference, there must be a contemplation of a winding-up, and there must, generally, be an absence of pressure (*p*).

Thus, a security not exhausting the whole property of the company, and given in consequence of a demand by the creditor

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(*i*) See *ante*, p. 603.

(*k*) *Willmott* v. *London Celluloid Co.*, 34 Ch. D. 147, C. A.

(*l*) *Sharp* v. *Jackson*, (1899) A. C. 419.

(*m*) *Re Vautin*, (1900) 2 Q. B. 325.

(*n*) *Exp. Dyer*, (1901) 1 K. B. 710.

(*o*) *Sharp* v. *Jackson*, *sup.*

(*p*) *Re Inns of Court Hotel Co.*, L. R. 6 Eq. 82. See *Willmott* v. *London Celluloid Co.*, 34 Ch. D. 147, C. A.; *Re Blackburn & Co.*, (1899) 2 Ch. 725.

at a time when there was nothing to show that a winding-up of the company was then contemplated, is not a fraudulent preference (*q*).

Where a company already in voluntary liquidation is wound up by the Court the fraudulent preference must be committed within three months of the petition and not of the resolution to wind up (*r*).

Security to director.

A security given by an insolvent company for payment of a debt due to a director cognisant of the state of the company's affairs may be set aside as an undue preference under this section, even although the director may have pressed for payment of his debt (*s*).

But the issue of debentures as collateral security for a debt of the company guaranteed by its chairman for the purpose of relieving him from liability is not a fraudulent preference (*t*).

An agreement to give security, if the security is not given until the eve of the winding-up, may be a fraudulent preference (*u*).

(*q*) *Re Patent File Co., Exp. Birmingham Banking Co.*, L. R. 6 Ch. 83.

(*r*) *Re Russell Hunting Record Co.*, (1910) 2 Ch. 78.

(*s*) *Gaslight Improvement Co.* v. *Terrell*, L. R. 10 Eq. 168. Cf. *Seligman* v. *Prince*, (1895) 2 Ch. 617.

(*t*) *Re Stenotyper, Ltd.*, (1901) 1 Ch. 250.

(*u*) *Re Jackson and Bassford*, (1906) 2 Ch. 467.

CHAPTER XXXII.

AVOIDANCE OF MORTGAGES UNDER THE STATUTE 27 ELIZ. C. 4.

Avoidance of covinous and fraudulent conveyances.

i.—The Statute 27 Eliz. c. 4.—This statute (*a*) enacts in effect, by sect. 1, that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses of, in or out of, any lands, tenements, or other hereditaments whatsoever, had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall afterwards purchase in fee simple, fee tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part thereof, or any rent, profit or commodity, in or out of the same or any part thereof, are declared void, as against purchasers for money or good consideration, and persons claiming under them.

Saving, however (by sect. 3), all estates in and assurances of lands made for good consideration and *bonâ fide*.

By sect. 4, every conveyance or assurance of lands, with a clause of revocation, is declared to be void as against a subsequent assurance of the same hereditaments or any part thereof made without exercise of the power of revocation, for money or other good consideration. Provided that no lawful mortgage, made *bonâ fide* without fraud upon good consideration, shall be impeached by force of the Act.

Property within 27 Eliz. c. 4.

Copyhold and other estates and interests in land are within the statute 27 Eliz. c. 4 (*b*), but not personal estate (*c*).

The consideration

It will be observed that the expression "voluntary conveyance" does not occur in this statute (*d*); but it has been held, that such conveyances are fraudulent within the meaning of

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(*a*) Made perpetual by the stat. 39 Eliz. c. 18, s. 31.

(*b*) *Currie* v. *Nind*, 1 My. & Cr. 17; *Doe* v. *Rolfe*, 8 A. & E. 650.

(*c*) *Bill* v. *Cureton*, 2 My. & K. 503, 512; *Jones* v. *Croucher*, 1 S. & St. 315.

(*d*) See *supra*.

the Act, though made without any intent to defraud (*e*). A conveyance for good and meritorious but not valuable consideration, and although free from actual fraud (*f*), is voluntary, and, because voluntary, fraudulent and capable of being set aside in favour of a subsequent mortgagee or other purchaser for value, even with notice of the voluntary conveyance (*g*).

What consideration is sufficient to support conveyance.

A conveyance, however, is not voluntary, if there is anything in the nature of consideration which can be called valuable (*h*). Questions as to what consideration is sufficient to support a conveyance under this statute have frequently arisen with regard to settlements. But such questions can seldom arise in the case of mortgages, except where a security is given for a past debt (*i*). In such a case, pressure by the creditor, or the fact that the mortgage was made pursuant to an agreement antecedent to or contemporaneous with the loan, would be deemed to be a sufficient consideration to take the mortgage out of the mischief of the statute. And even if no such agreement were proved, it would seem that, after a lapse of time, it would be presumed (*k*).

Consideration may be proved *aliunde*.

Although the deed be apparently voluntary, the consideration may be proved *aliunde* (*l*); but the onus of proving some valuable consideration generally falls on the person sustaining the deed (*m*).

Conveyances void under the statute on the ground of fraud.

A deed may be fraudulent within the statute 27 Eliz. c. 4, and therefore void as against a purchaser for value, independently of the question as to whether it is or is not voluntary. Thus a secret mortgage to secure a valid debt, retained by the mortgagor for his own purposes, is fraudulent within the statute against a *bonâ fide* mortgagee (*n*). So also a mortgage to a relative, the title deeds being left with the mortgagor to enable him to raise money on them, is fraudulent (*o*); and the assignee for value from the mortgagee, if he allows the deeds to remain

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(*e*) *Standen* v. *Bullock*, Moo. 605, 615; *Doe* v. *Manning*, 9 East, 57; *Trowell* v. *Shenton*, 8 Ch. D. 318.

(*f*) *Buckle* v. *Mitchell*, 18 Ves. 100.

(*g*) *Doe* v. *Manning*, 9 East, 59.

(*h*) *Re Foster*, 6 Ch. D. 89; *Teasdale* v. *Braithwaite*, 5 Ch. D. 630, C. A.

(*i*) *Lloyd* v. *Attwood*, 3 De G. & J. 614.

(*k*) *Cracknall* v. *Janson*, 11 Ch. D. 1, C. A.

(*l*) *Pott* v. *Todhunter*, 2 Coll. 76; *Gale* v. *Williamson*, 8 M. & W. 405.

(*m*) *Kelson* v. *Kelson*, 10 Ha. 385.

(*n*) *Cracknall* v. *Janson*, 11 Ch. D. 1, C. A.

(*o*) *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21; *Lloyd* v. *Attwood*, 3 De G. & J. 614.

with the original mortgagor, is also postponed (*o*); and a settlement is fraudulent if it reserves to the settlor an unlimited power to mortgage (*p*); but a power to charge with a particular sum is not so (*q*); and it is fraudulent if it reserve a power to make leases for any term with or without rent (*r*); but a power to be exercised with the consent of a third person is not (*s*).

Voluntary Conveyances Act, 1893.

By the Voluntary Conveyances Act, 1893 (*t*), it is enacted as follows:—

Voluntary conveyances, if *bonâ fide*, not to be avoided under 27 Eliz. c. 4.

> Sect. 2. "Subject as hereinafter mentioned, no voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of this Act, if in fact made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding."

Saving transactions completed before passing of Act.

> Sect. 3. "This Act does not apply in any case in which the author of a voluntary conveyance of any lands, tenements, or hereditaments has subsequently, but before the passing of this Act, disposed of or dealt with the same lands, tenements, or hereditaments to or in favour of a purchaser for value."

Definition of "conveyance."

> Sect. 4. "The expression 'conveyance' includes any mode of disposition mentioned in or referred to in the said Act of Elizabeth."

Application to Ireland.

> Sect. 5. "This Act shall extend to Ireland, and, as applied to Ireland, shall be read and construed as if the Act of 10 Car. I., sess. 2, c. 3 (Ireland), were substituted for the said Act of Elizabeth."

Effect of Act of 1893.

The result of this Act appears to be to render it unnecessary to show good consideration in order to support a *bonâ fide* mortgage of lands as against a subsequent incumbrancer or purchaser for value thereof, except in cases where the subsequent incumbrance or purchase has been effected before the 29th of June, 1893, the date of the passing of that Act.

The Voluntary Conveyances Act, 1893, only prevents conveyances from being avoided on the ground of want of consideration as against a subsequent purchaser for value, under the statute 27 Eliz. c. 4, but leaves that statute to operate as before so as to

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(*o*) *Ibid.*

(*p*) *Tarback* v. *Marbury*, 2 Vern. 510.

(*q*) *Jenkins* v. *Keymis*, 1 Lev. 150.

(*r*) *Lavender* v. *Blakstone*, 2 Lev. 146.

(*s*) *Butler* v. *Waterhouse*, 2 Show. 46.

(*t*) 56 & 57 Vict. c. 21.

avoid conveyances which are fraudulent irrespectively of the question of consideration.

A fraudulent mortgage would be postponed in equity to a subsequent mortgage apart from the statute of Elizabeth. But that statute would have the additional effect of preventing the legal estate from passing under the fraudulent mortgage (*u*).

Who are purchasers within the statute.

ii.—Against what Purchasers, &c. a Fraudulent Conveyance is avoided.—A mortgage, like any other conveyance which is voluntary or fraudulent within the Act of Eliz., is void as against a purchaser for valuable consideration and persons claiming under him.

Equitable purchasers and mortgagees, &c.

An equitable purchaser is within the statute (*x*), and a mortgagee is a purchaser *pro tanto* within it (*y*), as also an equitable mortgagee (*z*), and a mortgagee by deposit of title deeds (*a*); also the purchaser under a settlement made in consideration of an intended marriage (*b*); so a person who releases a contested right in consideration of the conveyance to him (*c*); also lessees at rack rent (*d*); but a lessee without fine or rent is not (*e*).

Persons claiming under settlements.

Persons claiming under ante-nuptial settlements are purchasers (*f*); so if under post-nuptial settlements made in consideration of ante-nuptial articles, or of an additional portion (*g*).

Judgment creditor.

A judgment creditor is not a purchaser within the statute (*h*), for he cannot be said to be one who gives money or other valuable consideration in order to have the land (*i*).

Cases under former law.

In cases not falling within the Voluntary Conveyances Act, 1893, the following points have been decided:—

Purchaser from heir or devisee.

The heir-at-law or devisee of the settlor cannot avoid the deed by a mortgage or conveyance for value (*k*).

(*u*) 2 De G. & J. pp. 39, 40.

(*x*) *Barton* v. *Vanheythusen*, 11 Ha. 126.

(*y*) *Chapman* v. *Emery*, Cowp. 278; *White* v. *Hussey*, Prec. in Ch. 13; *Lister* v. *Turner*, 5 Ha. 281; *Lloyd* v. *Attwood*, 3 De G. & J. 614.

(*z*) *Lloyd* v. *Attwood*, *sup.*

(*a*) *Lister* v. *Turner*, *sup.*; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172.

(*b*) *Douglas* v. *Ward*, 1 Ch. Ca. 79.

(*c*) *Hill* v. *Bishop of Exeter*, 2 Taunt. 69.

(*d*) *Goodright* v. *Moses*, 2 W. Bl. 1021.

(*e*) *Upton* v. *Bassett*, Cro. Eliz. 444.

(*f*) *Martin* v. *Seamore*, 1 Ch. Ca. 170.

(*g*) *Doe* v. *Rowe*, 4 Bing. N. C. 737. See *Trowell* v. *Shenton*, 8 Ch. D. 318.

(*h*) *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 507; *Dolphin* v. *Aylward*, L. R. 4 H. L. 416.

(*i*) 6 De G. M. & G. at p. 517, per L. C.

(*k*) *Parker* v. *Carter*, 4 Ha. 409; *Doe* v. *Lewis*, 11 C. B. 1035; *Doe* v. *Rusham*, 16 Jur. 359, Q. B.; *Lewis* v. *Rees*, 3 K. & J. 132.

Title under conveyances voidable under the statute.

Where a fraudulent conveyance is made to a man who makes a mortgage *bonâ fide*, and the conveyance is set aside by the creditors of the grantor, the title of the mortgagee is paramount to that of the creditors (*l*).

A voluntary grantee has, against all other persons except a purchaser for value, a complete estate, and can set aside a previous voidable conveyance (*m*). A purchase without notice from a voluntary grantee is valid (*n*).

The existence of a voluntary settlement on the title is not a valid objection (*o*).

Specific description not necessary.

A voluntary settlement may be avoided in favour of a subsequent mortgagee to whom the settlor's lands are conveyed by a general description, such as "all and singular my real estate," not specifically referring to the lands comprised in the settlement (*p*).

Rights and remedies of purchaser or mortgagee seeking to avoid as fraudulent conveyance.

The subsequent purchaser or mortgagee can recover in an action for land (as he could formerly by ejectment) against the volunteer (*q*), and he may bring an action to complete his purchase or mortgage and set aside the voluntary deed. The volunteer is a proper party to a suit by the purchaser or mortgagee to set the voluntary deed aside (*r*), but the volunteer has no equity to the purchase-money (*s*). And even if the sale is effected under a power contained in the voluntary settlement, the purchaser can safely pay the vendor the purchase-money, although, by the settlement, it ought to be held upon the trusts of the settlement (*t*).

The purchaser or mortgagee cannot require the voluntary settlement to be delivered up to be cancelled (*u*).

The settlor is himself bound by the settlement, and cannot bring an action to compel the purchaser to complete the contract (*x*), unless the defendant is a willing purchaser (*y*). Nor can the purchaser or mortgagee obtain relief in a suit instituted

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(*l*) *Major* v. *Ward*, 5 Ha. 598.

(*m*) *Dickinson* v. *Burrell*, L. R. 1 Eq. 337.

(*n*) *Doe* v. *Martyr*, 1 B. & P. N. R. 332.

(*o*) *Clarke* v. *Willott*, L. R. 7 Ex. 313.

(*p*) *Barton* v. *Vanheythusen*, 11 Ha. 131.

(*q*) *Doe* v. *James*, 16 East, 212.

(*r*) *Townend* v. *Toker*, L. R. 1 Ch. 446.

(*s*) *Ibid.*

(*t*) *Evelyn* v. *Templar*, 2 Bro. C. C. 148.

(*u*) *De Hoghten* v. *Money*, L. R. 2 Ch. 164.

(*x*) *Clarke* v. *Willott*, L. R. 7 Ex. 313.

(*y*) *Peter* v. *Nicolls*, L. R. 11 Eq. 391.

to set aside the settlement by himself and the settlor as co-plaintiffs (*z*).

The volunteer may, however, show, by evidence of the inadequacy of the consideration, that the purchase was colourable (*a*). And the declarations of the mortgagor are not admissible after his death to prove payment of the mortgage money against the parties claiming under the settlement (*b*).

(*z*) *Bill* v. *Cureton*, 2 My. & K. 503.

(*a*) *Doe* v. *James*, 16 East, 212.

(*b*) *Doe* v. *Webber*, 1 A. & E. 733.

CHAPTER XXXIII.

AVOIDANCE OF MORTGAGES AS BEING EXTORTIONATE.

General rule.

i.—Of Mortgages by Persons under Undue Influence generally.—Mortgages for inadequate or no consideration given to persons standing in a fiduciary or other relation to the mortgagor, by which he is subject to undue influence, are liable to be set aside and treated only as securities for so much money as can be proved to have been advanced, with interest at a reasonable rate.

Inadequate consideration.

Inadequacy of consideration alone does not give any title to relief (*a*). But such inadequacy, or the exorbitant terms of a bargain for a loan to a person who is in pecuniary distress may be material as indicating that the lender took advantage of the borrower's position so as to exercise undue influence over him. So, where a money-lender, advertising loans on easy terms, induced a farmer to give a bill of sale securing interest at 125 per cent. per annum, the bill of sale was set aside (*b*).

Security for loan by trustee to *cestui que trust*.

There is no rule of law or equity that a trustee may not lend money to his *cestui que trust* on the security of the trust property; but such a case is regarded by the Court with some jealousy, as it must be assumed that the trustee has acquired much information as to the nature and value of the property, and he will not be allowed to foreclose, as his duty is to take every possible step for saving the estate (*c*). A trustee cannot bargain for a benefit to himself with his *cestui que trust* (*d*).

Instances of undue influence.

Cases of undue influence arise where the borrower is a person of weak intellect (*e*); or where there exists the relation of child and parent; or person standing *in loco parentis;* or ward

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(*a*) *Guest* v. *Harrison*, 8 H. L. C. 481.

(*b*) *Moorhouse* v. *Wolfe*, 46 L. T. 374.

(*c*) *Tennant* v. *Trenchard*, L. R. 4 Ch. 537.

(*d*) See *Vaughton* v. *Noble*, 30 Beav. 39.

(*e*) *Longmate* v. *Ledger*, 2 Giff. 157.

and guardian (*f*); or client and solicitor (*g*); or patient and medical attendant (*h*); or where one party has obtained a spiritual ascendancy over another (*i*); or where any person transacts business with another under whose influence he may be supposed to be (*k*). The rule stands on general principle applying to all the variety of relations by which dominion may be exercised by one person over another (*l*), but it does not apply to husband and wife (*m*). Some of the decisions cited in the notes relate to cases of gifts obtained by undue influence; but the principles stated therein seem equally to apply to cases of unconscionable bargains by way of loan.

Relation of parent and child.

Dealings between a child and his parent are regarded with great jealousy by the Court, especially if the child has only recently come of age, as he is peculiarly liable to be unduly influenced to the advantage of his parent by the exercise of parental authority and pressure (*n*). So where a daughter, then about twenty-two years old, in order to save her father from bankruptcy, was induced to mortgage her property to pay his debts, and the daughter had no independent advice, the transaction was set aside (*o*).

If, however, a transaction between a child and his parent is *bonâ fide* and reasonable, it will not be set aside (*p*).

Guardian and ward.

Similarly, the Court is extremely watchful to prevent a guardian from taking advantage, immediately upon his ward coming of age, and at the time of settling accounts, because undue influence may be used (*q*). *A fortiori*, if the accounts are not settled, or if the guardian still retains control over the property of his late ward (*r*).

(*f*) *Powell* v. *Powell*, (1900) 1 Ch. 243. See Kerr on Fraud, 4th ed. 177, 179.

(*g*) See *inf.*

(*h*) *Dent* v. *Bennett*, 4 My. & Cr. 262. But see *Blackie* v. *Clark*, 15 Beav. 595.

(*i*) *Norton* v. *Relly*, 2 Ed. 286; *Nottage* v. *Prince*, 2 Giff. 246; *Allcard* v. *Skinner*, 36 C. D. 145, C. A. See also *Lyon* v. *Home*, L. R. 6 Eq. 655.

(*k*) *Kay* v. *Smith*, 7 H. L. C. 750.

(*l*) Per Sir S. Romilly, arg. in *Huguenin* v. *Baseley*, 14 Ves. 273, adopted by Wright, J., in *Morley* v. *Loughnan*, (1893) 1 Ch. 736, 752.

(*m*) *Howes* v. *Bishop*, (1909) 2 K. B. 390; *Bank of Africa* v. *Cohen*, (1909) 2 Ch. at p. 135.

(*n*) *Carpenter* v. *Herriot*, 1 Ed. 338; *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Turner* v. *Collins*, L. R. 7 Ch. 329; *Powell* v. *P.*, (1900) 1 Ch. 243.

(*o*) *De Witte* v. *Addison*, 80 L. T. 207; *London and Westminster Loan Co.* v. *Bilton*, 27 T. L. R. 184.

(*p*) *Blackborn* v. *Edgley*, 1 P. Wms. 600; *Hoblyn* v. *Hoblyn*, 41 C. D. 200.

(*q*) *Hylton* v. *Hylton*, 2 Ves. 547; *Aylward* v. *Kearney*, 2 Ba. & Be. 463; *Powell* v. *Powell*, (1900) 1 Ch. 243.

(*r*) *Pierse* v. *Waring*, 1 P. Wms.

This principle applies to persons acting as guardians, though not legally constituted guardians (*s*).

Transactions between wards and their guardians are liable to be set aside after considerable lapse of time if it appears that the influence induced by the relationship has continued directly or indirectly (*t*).

Unconscionable mortgage set aside after lapse of time.

Where a confidential relation is proved to have existed between the parties, the dealings between them may be set aside on the ground of undue influence, even though at the time of such dealings the actual relation between them had come to an end (*u*), if the influence attributable thereto continues (*x*). And where a confidential relation is proved, it seems that the Court will presume its continuance unless it is clearly shown to have ceased (*y*).

Independent advice.

The onus in all these cases is on the purchaser or mortgagee to show that the grantor had competent independent professional advice, and was not misled by any contrivance or false recital or suggestion (*z*). But where the father's solicitor professed to act on behalf of the children, the mortgagee was not fixed with notice of undue influence (*a*).

Independent professional advice is not necessary when the fiduciary relation has completely ceased to exist (*b*), not only as regards the transaction in question, but as regards other matters also (*c*).

Unconscionable mortgage may be valid if parties are strangers.

It has been held, in the case of a voluntary gift (*d*), and it is conceived that the same principle would apply to a mortgage the terms of which are exorbitant, that the Court will not set aside the transaction where the parties are strangers, not standing in any confidential relation to each other, unless undue influence, misrepresentation, or other actual fraud is shown;

120, n.; *Hylton* v. *Hylton, sup.*, at p. 549.

(*s*) *Griffin* v. *De Veuille*, 3 P. Wms. 131, n.; *Huguenin* v. *Baseley*, 14 Ves. 273, at p. 283; *Hylton* v. *Hylton, sup.*

(*t*) *Aylward* v. *Kearney*, 2 Ba. & Be. 463; *Hatch* v. *Hatch*, 9 Ves. 292.

(*u*) *Hylton* v. *Hylton*, 2 Ves. Sen. 547; *Maitland* v. *Irving*, 15 Sim. 437.

(*x*) *Wright* v. *Carter*, (1903) 1 Ch. 27.

(*y*) See *Rhodes* v. *Bate*, L. R. 1 Ch. 252.

(*z*) *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Powell* v. *Powell*, (1900) 1 Ch. 243; *Wright* v. *Carter*, *inf.*

(*a*) *Bainbrigge* v. *Browne*, 18 Ch. D. 188. See *O'Rorke* v. *Bolingbroke*, 2 App. Ca. 814.

(*b*) *Mitchell* v. *Homfray*, 8 Q. B. D. 587, C. A., commenting on *Rhodes* v. *Bate*, L. R. 1 Ch. 252.

(*c*) *Wright* v. *Carter*, (1903) 1 Ch. 27, C. A.

(*d*) *Villers* v. *Beaumont*, 1 Vern. 100.

and in such cases the burden of proving undue influence or fraud lies on the person seeking to avoid the transaction (*e*).

Indirect exercise of undue influence.

But a security for a debt or advance is liable to be set aside on the ground of undue influence, where such influence is exercised not directly by a stranger who advances the money, but through the debtor or borrower, between whom and the person giving the security a confidential relation subsists. So where a son, who had recently come of age, at his father's instigation, and without independent professional advice, joined with his father in a mortgage to secure debts due from the father, it was held that the mortgage was void as obtained by undue influence (*f*). So securities given by a niece for debts due from her uncle, who had been her guardian, were set aside (*g*). So, also, where a debtor induced a lady, to whom he was engaged to be married, to give a security for his debt (*h*).

Assignee of mortgage obtained by undue influence.

An assignee for value of a security, with notice that it was obtained by undue influence, will be in no better position than the original mortgagee (*i*). But a security, though originally so obtained, will not be set aside as against a *bonâ fide* assignee without notice (*k*).

Sale turned into mortgage.

In cases of undue influence generally, where the transaction takes the form of a sale, the conveyance will be directed to stand as a security for the amount actually found due, with interest on the footing of a mortgage (*l*), but the costs are in the discretion of the Court (*m*); and in case of refusal on tender of a proper sum, the mortgagee will be fixed with costs (*n*), as also where there has been fraud, or misrepresentation, or other misconduct (*o*), in which case the security will be set aside unconditionally (*p*). But in general the defendant will be put in the

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(*e*) *Hunter* v. *Atkins*, 3 My. & K. 113; *Toker* v. *Toker*, 31 Beav. 629; *Armstrong* v. *Armstrong*, Ir. R. 8 Eq. 1; but see now Money Lenders Act, 1900, *post*, p. 638.

(*f*) *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Berdoe* v. *Dawson*, 34 Beav. 603; *Espey* v. *Lake*, 10 Hare, 260; *Savery* v. *King*, 5 H. L. C. 627.

(*g*) *Archer* v. *Hudson*, 7 Beav. 551; *Maitland* v. *Irving*, 15 Sim. 437.

(*h*) *Corbett* v. *Brock*, 20 Beav. 524.

(*i*) *Bainbrigge* v. *Browne*, 18 Ch. D. 188, 197.

(*k*) *Blackie* v. *Clark*, 15 Beav. 595.

(*l*) *Peacock* v. *Evans*, 16 Ves. 512; *Davis* v. *Duke of Marlborough*, 2 Swanst. 139; *Brenchley* v. *Higgins*, 70 L. J. Ch. 788, C. A.

(*m*) *Tyler* v. *Yates*, L. R. 11 Eq. 265.

(*n*) *Tottenham* v. *Emmet*, 11 L. T. N. S. 404; *S. C.*, 12 L. T. N. S. 838; *Nevill* v. *Snelling*, 15 Ch. D. 679.

(*o*) *Kay* v. *Smith*, 7 H. L. C. 750; *Thomas* v. *Lloyd*, 3 Jur. N. S. 288; *Tottenham* v. *Green*, 32 L. J. Ch. 201.

(*p*) See *Chapman* v. *Michaelson*, *post*, p. 639.

same position as if the transaction had not taken place (*q*). The plaintiff in such a suit will be made to pay the costs occasioned by charges of fraud which he does not substantiate (*r*).

ii.—Mortgages to Solicitors by their Clients.—The question of undue influence has frequently been raised in cases of securities given to solicitors to secure advances made by them to their clients.

Former rule as to securities for costs.

Formerly a mortgage by his client to a solicitor for costs due and to become due was restricted to those actually due (*s*); but there was no objection to a security given to a solicitor for a debt really due, or for a reasonable reward for services rendered (*t*). Nor was it unfair for a solicitor to stipulate, on procuring money for his client on mortgage, that the security should cover the balance which should be found due to him on a settlement of accounts (*t*). And with respect to the rule as to future costs, a distinction was drawn as to those cases where the client, being a trustee, stipulated that the attorney should not make demand upon him personally, and agreed with him that, when funds were in hand, he should be paid thereout such claim as he might have a right to make (*u*).

Present rule.

But now a solicitor may take security for his future costs, charges, and disbursements to be ascertained by taxation, or otherwise (*x*), which may now include profit costs of and incident to the mortgage (*y*).

Charges made by a solicitor, though secured by mortgage, have long been open to taxation (*z*). And a mortgagor may, under 6 & 7 Vict. c. 73, obtain an order for taxation at any time before payment, or, under special circumstances, even after payment (*a*); but, under such circumstances, a strong case must be made against the solicitor (*b*).

(*q*) *Savery* v. *King*, 5 H. L. C. 627.

(*r*) *Edwards* v. *Burt*, 2 De G. M. & G. 65; *St. Albyn* v. *Harding*, 27 Beav. 11; *Foster* v. *Roberts*, 29 Beav. 471.

(*s*) *Pitcher* v. *Rigby*, 9 Pri. 79; *Re Moss*, 17 Beav. 346. See as to accounts between solicitor-mortgagees and client-mortgagors, *post*, Chap. LIV., Sect. I. (vi).

(*t*) *Cheslyn* v. *Dalby*, 2 Y. & C. Exch. 170; *Pearson* v. *Benson*, 28 Beav. 598.

(*u*) Per Wigram, V.-C., in *Parsons* v. *Spooner*, 5 Ha. 111.

(*x*) 33 Vict. c. 28, s. 16; 44 & 45 Vict. c. 44, s. 5.

(*y*) 58 & 59 Vict. c. 25, *post*, Chap. LIV.

(*z*) *Walmsley* v. *Booth*, 2 Atk. 27; *Newman* v. *Payne*, 4 Bro. C. C. 350; *Morgan* v. *Lewes*, 4 Dow, 29.

(*a*) *Re Carew*, 8 Beav. 150. See *Re Sutton*, 11 Q. B. D. 377.

(*b*) *Horlock* v. *Smith*, 2 My. & Cr. 510. See *Waters* v. *Taylor*, 2 My. & Cr. 526; *Wragge* v. *Denham*, 2 Y. & C. Exch. 117.

A solicitor who has a mortgage for his costs may commence an action of foreclosure without having first had his bill of costs taxed, notwithstanding sect. 37 of the Act (*c*).

A solicitor cannot enforce a charge on his client's estate pending the taxation of the costs (*d*).

Security on subject-matter of suit.

A security given by a client to his solicitor upon the subject-matter of the suit is valid, as it is likely to be beneficial to the client (*e*).

A sale, however, by the client to his solicitor of such subject-matter is void for champerty or maintenance (*f*), and will only stand as a security for the money actually advanced (*g*).

Dealings with clients regarded with jealousy.

All securities from clients to their solicitors, and, in fact, all their dealings, are regarded with jealousy, as the relation between them gives such room for the exercise of undue influence, and may be so easily abused, that they are not allowed to deal upon the same footing as other persons (*h*).

In all such dealings the solicitor must show that he has taken no advantage, but has given his client every information, advice and protection, as if the client had been dealing with a stranger, and in default thereof a purchase will be treated as a security for the amount actually due (*i*).

Dealings set aside after lapse of time.

The transaction will be set aside after many years, and after the deaths of the parties, if the facts have been concealed or misrepresented so as not to have been known to the client (*k*). Though lapse of time always forms an ingredient in these cases, less weight will be attached to it, whilst the relation between the parties still continues (*l*).

Unusual provisions not allowed.

The rules in regard to securities by clients are strict; the debt secured must, before the statute, have been actually due, and the onus of ascertaining the amount falls on the solicitor.

(*c*) *Thomas* v. *Cross*, 10 Jur. N. S. 1163; and see 34 C. D. 550.

(*d*) *Waugh* v. *Waddell*, 16 Beav. 521.

(*e*) *Anderson* v. *Radcliffe*, E. B. & E. 816; *Wood* v. *Downes*, 18 Ves. 120.

(*f*) *Simpson* v. *Lamb*, 7 E. & B. 84.

(*g*) *Wood* v. *Downes*, *sup.* See *Lewis* v. *Hillman*, 3 H. L. C. 607; *James* v. *Kerr*, 40 Ch. D. 449.

(*h*) *Walmsley* v. *Booth*, 2 Atk. 27; *Barron* v. *Willis*, (1900) 2 Ch. 121, C. A.

(*i*) *Cane* v. *Allen*, 2 Dow, 289; *Gibson* v. *Jeyes*, 6 Ves. 266; *Welles* v. *Middleton*, 1 Cox, 112; *Holman* v. *Loynes*, 4 De G. M. & G. 270; *Tomson* v. *Judge*, 3 Drew. 306; *Higgins* v. *Joyce*, 2 J. & L. 282; *Gibbs* v. *Daniel*, 4 Giff. 1; *Wright* v. *Carter*, (1903) 1 Ch. 27, C. A.

(*k*) *Charter* v. *Trevelyan*, 11 Cl. & F. 714; *Ward* v. *Sharp*, 32 W. R. 584.

(*l*) *Gresley* v. *Mousley*, 4 De G. & J. 96. See *Lyddon* v. *Moss*, 4 De G. & J. 104; *Blagrave* v. *Routh*, 3 Jur. N. S. 399.

There must be no unusual provisions in the security which will prejudice the client (*m*); and if any advantage is given to the solicitor such as interest upon costs, full information must have been furnished to the client of his rights (*n*).

Consolidation.

A solicitor reserving to himself a right to consolidate mortgages should explain the existing law and the effect of the reservation (*o*).

Proviso for redemption.

If any unreasonable postponement of the time for redemption is inserted, the mortgagor will have the same rights as in an ordinary mortgage (*p*), and especially so if there has been any concealment or misrepresentation (*q*).

Power of sale.

Where a mortgage by a client to his solicitor contained a power of sale to be exercised, although there was no default, and without the attention of the client being especially called to it, a sale was set aside, and the solicitor was fixed with the damages and costs, the damages including the difference between solicitor and client and party and party costs (*r*).

Where, however, a client owed a sum to his solicitor, and, being pressed for payment, executed a charge to secure the debt containing a power for the solicitor to sell the property without notice if the money was not paid by a specified day, it was held that this was not an ordinary mortgage transaction, but an arrangement for giving time to the debtor, and accordingly, that a sale under the power could not be impeached, though the debtor had no independent advice, and it did not appear that the unusual form of the power was explained to him (*s*).

Obligation of solicitor to trustee of bankrupt client.

The obligation of a solicitor in dealings with his client extends to cases where the solicitor of a bankrupt is dealing with the trustee in the client's bankruptcy (*t*).

Where a solicitor takes a mortgage for costs and his client becomes bankrupt, and the solicitor proves for the amount, the trustee in bankruptcy ought to go behind the account and require evidence that the debt is a real debt (*u*).

(*m*) *Cowdry* v. *Day*, 1 Giff. 316; *Cockburn* v. *Edwards*, 18 Ch. D. 449, C. A.; *Cradock* v. *Rogers*, 53 L. J. Ch. 968; on appeal, W. N. (1885) 134, C. A.

(*n*) *Lyddon* v. *Moss*, 4 De G. & J. 104.

(*o*) *Climpson* v. *Coles*, 23 Q. B. D. 467, 468.

(*p*) See note (*m*), *sup.*

(*q*) *Cowdry* v. *Day*, *sup.*; *Thomas* v. *Lloyd*, 3 Jur. N. S. 288.

(*r*) *Cockburn* v. *Edwards*, 18 Ch. D. 449, C. A.; *Cradock* v. *Rogers*, 53 L. J. Ch. 968.

(*s*) *Pooley's Trustee* v. *Whetham*, 33 Ch. D. 111, C. A.

(*t*) *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500.

(*u*) *Re Van Laun, Exp. Chatterton*, (1907) 2 K. B. 23, C. A.

Severance of relation of solicitor and client.

A solicitor whose fiduciary relation towards his client has been put an end to is free from all obligations incident to the relation in subsequent dealings with his former client (*x*), if the influence attributable to such relation is also at an end (*y*).

Security for gift to solicitor void.

A gift or security for a gift to a solicitor by his client pending the relation is voidable (*z*), and no such gift can be supported unless the relation between the parties had been finally severed (*a*), or unless the solicitor can show that the gift was uninfluenced by his position of solicitor (*b*).

Grounds for setting aside mortgages of reversions.

iii.—Dealings with Reversionary Interests.—The Court, for the protection of expectant heirs, frequently grants relief against dealings with reversionary interests and expectancies, and the like, on the ground of fraud, and, in such cases, inadequacy of consideration is still a material element in raising a presumption of fraud.

Unconscionable bargains with young men will be set aside, though they have mere expectations from their relations, where the bargains are not understood by the borrower (*c*). But, though youth is treated as an important circumstance, relief may, in a proper case, be granted against an unconscionable bargain, though the mortgagor was a person of mature age (*d*), and, in such a case, a mortgage of an expectant or reversionary interest is liable to be set aside if its terms are unreasonable, where the mortgagor is poor and ignorant, especially if he is without independent advice (*e*). And the same rule would apparently be applied even where the mortgaged interest is in possession (*f*). But in such cases a bargain will not be readily presumed to be unconscionable on account of inadequacy of consideration, unless it is clearly proved to be the result of fraud, surprise, or misrepresentation, or unless the inadequacy is so gross as of itself thereby to indicate fraud, so as to afford a ground for setting aside a mortgage (*g*). On the other hand,

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(*x*) *Boswell* v. *Coaks*, 23 Ch. D. 302; but see L. R. 1 Ch. at p. 260.

(*y*) *Wright* v. *Carter*, *inf.*

(*z*) *Newman* v. *Payne*, 4 Bro. C. C. 350; *Liles* v. *Terry*, (1895) 2 Q. B. 679.

(*a*) *Morgan* v. *Minett*, 6 Ch. D. 638.

(*b*) *Wright* v. *Carter*, (1903) 1 Ch. 27, C. A.

(*c*) *Nevill* v. *Snelling*, 15 Ch. D. 679. See *Readdy* v. *Prendergast*, 56 L. T. 790.

(*d*) *Earl of Portmore* v. *Taylor*, 4 Sim. 182; *Davis* v. *Duke of Marlborough*, 2 Swanst. 139 at p. 143.

(*e*) *Fry* v. *Lane*, 40 Ch. D. 312. See *James* v. *Kerr*, 40 Ch. D. 449; *Rae* v. *Joyce*, 29 L. R. Ir. 500, C. A.

(*f*) *Fry* v. *Lane*, *sup.*, per Kay, J., at p. 322.

(*g*) *Gwynne* v. *Heaton*, 1 Bro.

it has been held in several cases that it is not necessary for the mortgagor to prove that he was in actual penury at the time of the transaction (*h*).

Interference of Court formerly limited to expectancies.

This interference of the Court was at first limited to dealings with expectancies, or what is called *post-obit* securities, which the Court has always regarded with a jealous eye; and unless the transaction has been a fair one, it has either restrained an action at law upon the securities (*i*), or set the bargain aside as unconscionable (*k*), or refused to carry it into execution, leaving the plaintiff to his remedy at law (*l*). The onus falls on the mortgagee to show that the bargain is provident (*m*). But where the bargain is a fair one, the Court will enforce an agreement which rests on a contingency, although the event has turned out favourable for the mortgagee or purchaser (*n*). And the debtor cannot invariably impeach the *post-obit* security, though the money might have been raised on more moderate terms (*o*). Nor will the Court grant relief further than as against the penalty of a bond, where the debtor, after coming into possession, and being under no pressure, has chosen to confirm the bargain (*p*). It is also to be remarked that dealings with expectancies, though liable to be set aside on the ground of fraud, were not within the Statutes of Usury, on account of the risk of the principal (*p*).

Vested reversionary interests.

The same principle of relief was extended to sales of vested reversionary interests (*q*). The doctrine not only includes the class who in a popular sense might be called "expectant heirs," but also all remaindermen and reversioners (*r*). Although a

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C. C. 8; *James* v. *Morgan*, 1 Lev. 111; *Stilwell* v. *Wilkins*, Jac. 280; *Rice* v. *Gordon*, 11 Beav. 265; *Haygarth* v. *Wearing*, L. R. 12 Eq. 320.

(*h*) *Bromley* v. *Smith*, 26 Beav. 644; *Salter* v. *Bradshaw*, 26 Beav. 161; *St. Aubyn* v. *Harding*, 27 Beav. 11; *Foster* v. *Roberts*, 29 Beav. 467; *Emmet* v. *Tottenham*, 10 Jur. N. S. 1090.

(*i*) *Marsack* v. *Reevers*, 6 Madd. 108.

(*k*) *Sir John Barnardiston* v. *Lingood*, 2 Atk. 133; *Wiseman* v. *Beake*, 2 Vern. 121; *Earl of Ardglasse* v. *Muschamp*, 1 Vern. 237; *Wharton* v. *May*, 5 Ves. 27; *Curling* v. *Marquis of Townshend*, 19 Ves. 628. See *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484; *Beynon* v. *Cook*, L. R. 10 Ch. 389.

(*l*) *Johnson* v. *Nott*, 1 Vern. 271.

(*m*) *Davis* v. *Duke of Marlborough*, 2 Swanst. 139.

(*n*) *Mortimer* v. *Capper*, 1 Bro. C. C. 156; *Baker* v. *Bent*, 1 R. & My. 224. But see *Pope* v. *Roots*, 1 Bro. P. C. 370.

(*o*) *Curling* v. *Marquis of Townshend*, 19 Ves. 628; *Wharton* v. *May*, 5 Ves. 27.

(*p*) *Lord Chesterfield* v. *Janssen*, 2 Ves. Sen. 125. And see generally as to dealings with expectant heirs, the notes on this case in 1 Wh. & Tud. L. C. Eq. (8th ed.) 303 *et seq.*; *Wharton* v. *May*, 5 Ves. 27.

(*q*) 1 Sug. V. & P. 14th ed. p. 285.

(*r*) Per Jessel, M.R., in *Beynon* v. *Cook*, L. R. 10 Ch. 391, n. See reversion which is expectant upon the failure of issue of a tenant for life is generally not capable of valuation (*s*), yet if such tenant for life be a female, who has been many years married without having issue, though not past the age of child-bearing, it seems that the Court will, for the purposes of valuation, treat the interest expectant on her death without issue as a simple reversion (*t*).

Privity of father, &c.

It was held in one case that although an expectant heir might be entitled to relief, he would lose such title if he acted in the matter with the privity of the father or other person standing *in loco parentis*, but in that case the heir had also, after repudiating the bargain, acted in such a manner as to alter the situation of the other party and his property (*u*). But the principle that the fact that dealings by an expectant heir are known to his father or other relative deprives the heir of his equity to relief is strongly dissented from by Lord St. Leonards (*x*). And it may now be regarded as settled that such knowledge, though material as tending to rebut the presumption of fraud or extortion (*y*), will not of itself prevent relief from being given in a proper case (*z*).

Life interest.

The interest of a tenant for life, whose estate is subject to annuities and to interest upon mortgages, is not a reversionary interest within the scope of these considerations (*a*).

How value ascertained.

Although a party dealing with an expectant heir must before the Sale of Reversions Act (*b*) have shown that he gave a fair price for his *post-obit* securities, such value, where a valuation is possible, was to be ascertained not by the tables of actuaries, but by the market price at the time of dealing, taking all the circumstances of health and age into account; and it was in the discretion of the Court to direct an inquiry if it had not sufficient information (*c*).

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also *Tottenham* v. *Emmet*, 11 L. T. N. S. 404; *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484, 497.

(*s*) *Baker* v. *Bent*, 1 R. & My. 224.

(*t*) *Davies* v. *Cooper*, 5 My. & Cr. 270. See *Lord* v. *Jeffkins*, 35 Beav. 7; *Benyon* v. *Fitch*, 35 Beav. 570.

(*u*) *Hamlet* v. *King*, 3 Cl. & F. 218.

(*x*) Sug. V. & P. 11th ed. p. 316.

(*y*) *O'Rorke* v. *Bolingbroke*, 2 App. Ca. 814.

(*z*) *Talbot* v. *Stainforth*, 1 J. & H. 484, 502; *Savery* v. *King*, 5 H. L. C. 627; *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 492; *Miller* v. *Cook*, L. R. 10 Eq. 641.

(*a*) *Webster* v. *Cook*, L. R. 2 Ch. 542; questioned, *Tyler* v. *Yates*, L. R. 11 Eq. 276.

(*b*) *Infra*.

(*c*) *Lord Aldborough* v. *Trye*, 7 Cl. & F. 436. And see *Headen* v. *Bosher*, M'Cl. & Y. 89; *Potts* v. *Curtis*, Y. 543; *Baker* v. *Bent*, 1 R. & My. 224.

Hence, a sale by auction of expectancies, or of securities thereon, was held good, that being evidence of the market price (*d*).

In estimating the value of a contingent reversionary interest, the Court may admit evidence to show how far such value is affected by the remoteness of the contingency (*e*). The adequacy of the consideration is a matter for the Court to decide in each case, having regard to the circumstances of the particular transaction (*f*).

Sale of Reversions Act.

By the Sale of Reversions Act (*g*), it is enacted that no purchase, made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue; and the word "purchase" shall include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired.

The Act came into operation on January 1, 1868, and does not apply to any purchase concerning which any suit was then depending. It is in other respects retrospective.

Effect of this Act.

The law regarding setting aside unfair and unconscionable bargains respecting reversionary interests remains the same as before the statute (*h*). The Act leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the *onus probandi* in those cases, which, according to the language of Lord Hardwicke (*i*), "raise from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *primâ facie* to raise this presumption, the

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(*d*) *Shelley* v. *Nash*, 3 Madd. 232.

(*e*) *Baker* v. *Bent*, 1 R. & My. 224; *Davies* v. *Cooper*, 5 My. & Cr. 270; *Boothby* v. *Boothby*, 1 Mac. & G. 604.

(*f*) See and compare *Nott* v. *Hill*, 2 Ch. Ca. 121; *Edwards* v. *Browne*, 2 Coll. 100; *Edwards* v. *Burt*, 2 De G. M. & G. 62; *Foster* v. *Roberts*, 29 Beav. 471; *Jones* v. *Ricketts*, 31 Beav. 130.

(*g*) 31 Vict. c. 4; 1 Wh. & Tud. L. C. (8th ed.) 332.

(*h*) *Tyler* v. *Yates*, L. R. 6 Ch. 665; *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 480; *Beynon* v. *Cook*, L. R. 10 Ch. 392; *Nevill* v. *Snelling*, 15 Ch. D. 679; *Brenchley* v. *Higgins*, 70 L. J. Ch. 788, C. A.

(*i*) In *Earl of Chesterfield* v. *Janssen*, 2 Ves. Sen. 125, at p. 157.

transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable" (*k*).

The burden of proof will, however, apparently be shifted, so far as undervalue is concerned, if the value of the property has been stated by the mortgagor in his proposals (*l*).

In a case of setting aside for inadequacy of value a sale by a young man of a reversion, relief was refused, there being no fraud; but it was held by Lord Hatherley, that as a separate and independent adviser was not employed, the whole transaction must be opened (*m*).

Relief against assignee, with notice.

Relief may be granted as against an assignee of a mortgage with notice of fraud affecting the original transaction (*n*).

Nature of relief.

The Court gives relief in cases of sales and mortgages of expectant and reversionary interests on the principle of redemption; the conveyance will stand as a security for principal and interest, and generally for costs also (*o*).

Mortgages of reversionary interests stand on the same principle as sales (*p*); and the mortgagee is only entitled to the sum advanced with interest and costs as mortgagee (*q*).

Interest.

But compound interest is not given, however long the purchaser has been kept out of his money (*r*).

Costs.

Costs, though they will generally be allowed, are in the discretion of the Court (*s*).

Accounts.

Accounts between borrower and lender relating to *post-obit* bonds or mortgages of reversionary interests will not be treated as settled accounts (*t*).

(*k*) Per Lord Selborne in *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484, at p. 490. See *Fry* v. *Lane*, 40 Ch. D. 312.

(*l*) *Perfect* v. *Lane*, 3 De G. F. & J. 369.

(*m*) *O'Rorke* v. *Bolingbroke*, 2 App. Ca. 814.

(*n*) *Addis* v. *Campbell*, 4 Beav. 401; *Savery* v. *King*, 5 H. L. C. 627; *Wright* v. *Vanderplank*, 2 Jur. N. S. 599.

(*o*) *Edwards* v. *Browne*, 2 Coll. 100; *Bawtree* v. *Watson*, 3 My. & K. 339, 341; *Hilliard* v. *Gambel*, Taml. 375; *Brenchley* v. *Higgins*, 70 L. J. Ch. 788, C. A.

(*p*) *Benyon* v. *Fitch*, 35 Beav. 510; *Emmet* v. *Tottenham*, 10 Jur. N. S. 1090; *Bromley* v. *Smith*, 26 Beav. 644.

(*q*) *Re Slater's Trust*, 11 Ch. D. 227; see *Bowes* v. *Heaps*, 3 V. & B. 117.

(*r*) *Gowland* v. *De Faria*, 17 Ves. 20.

(*s*) *Tyler* v. *Yates*, L. R. 11 Eq. 265; see *Bromley* v. *Smith*, 26 Beav. 644, 676; *Neville* v. *Snelling*, 15 Ch. D. 679; *Fry* v. *Lane*, 40 Ch. D. 312; *James* v. *Kerr*, 40 Ch. D. 449.

(*t*) *Croft* v. *Graham*, 2 De G. J. & S. 155; *Tottenham* v. *Green*, 1 N. R. 466. See further as to accounts between mortgagees and mortgagors, *post*, Chap. LIV.

Receiver.

In a suit to set aside *post-obit* securities a receiver of the rents of the estate would not usually be granted, on the motion of the defendant, if the principal money and interest were paid into Court (*u*). But where the whole security possessed by the party making the motion was contingent on the life of the borrower, and the lender had been out of his money for twenty years, the Court granted a receiver, notwithstanding an offer on the part of the plaintiff to pay principal and interest into Court (*x*).

Ratification of transaction.

A mortgagor may lose his right to relief against an unconscionable bargain by any act amounting to a formal confirmation of the transaction, as by executing a deed or will expressly or impliedly confirming the same (*y*); especially if in so doing he has acted under independent and competent advice (*z*). He may also lose his right by any act which so alters the relation of the parties as to render it impossible for him to restore the consideration with interest and costs. So where goods were sold to a person in distressed circumstances by a tradesman; he knew that they were bought merely with a view to raise money by selling them again, and the goods were resold accordingly; the Court refused to set aside securities given for the price (*a*). The right to relief may also be lost by acquiescence for a considerable length of time (*b*).

But confirmation or acquiescence will not deprive a person of his right to relief if, at the time of confirmation, or during the period of acquiescence, the borrower continues to be under the same pecuniary distress or pressure which forced him to enter into the original transaction (*c*). He must be a free agent, with full knowledge of the facts, and to some extent the law also (*d*).

(*u*) *Curling* v. *Marquis of Townshend*, 19 Ves. 628.

(*x*) *Free* v. *Hinde*, 2 Sim. 7.

(*y*) *Cole* v. *Gibbons*, 3 P. Wms. 289; *Stump* v. *Gabey*, 2 De G. M. & G. 623; *Mitchell* v. *Homfray*, 8 Q. B. D. 487, explained 36 Ch. D. at p. 187.

(*z*) *Lyddon* v. *Moss*, 4 De G. & J. 104.

(*a*) *King* v. *Hamlet*, 3 Cl. & F. 218.

(*b*) *Sibbering* v. *Earl of Balcarras*, 3 De G. & S. 735; *Addis* v. *Campbell*, 4 Beav. 401; *Lord* v. *Jeffkins*, 35 Beav. 7; *Turner* v. *Collins*, L. R. 7 Ch. 329; *Allcard* v. *Skinner*, 36 Ch. D. 145, C. A. See *Gerrard* v. *O'Reilly*, 3 Dr. & War. 414.

(*c*) *Gowland* v. *De Faria*, 17 Ves. 20; *Curwyn* v. *Milner*, 3 P. Wms. 292, n. (where an obligee was compelled to refund money actually paid on a *post-obit* bond); *Medlicott* v. *O'Donel*, 1 Ba. & Be. 156; *Kendall* v. *Beckett*, 2 R. & My. 88; *Edwards* v. *Browne*, 2 Coll. 100; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15.

(*d*) *Allcard* v. *Skinner*, 36 Ch. D. pp. 188, 192; *Barron* v. *Willis*, (1900) 2 Ch. 121, C. A.

Statute of Limitations.

The Statute of Limitations will, in the case of a mortgage of a reversionary interest, begin to run only from the time when the interest falls into possession so as to preclude the borrower from seeking to set aside the mortgage (*e*). But although an equitable mortgage of a reversionary interest in land is not barred till twelve years after the interest falls in, that doctrine does not apply unless the person entitled to the charge had a right of foreclosure (*f*).

Money-lenders Act, 1900.

iv.—Money-lenders.—By the Money-lenders Act, 1900 (*g*), s. 1, where proceedings are taken in any Court by a money-lender for the recovery of money lent or the enforcement of any security taken after the commencement of the Act in respect of money lent either before or after the Act, and the interest charged is excessive or the amounts charged for expenses, inquiries, or any other charges are excessive, and that in either case the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction, and notwithstanding any settlement of account, may reopen the account and relieve the person sued from payment of any sum beyond what the Court adjudges to be fairly due, and may set aside or revise or alter any security given by the money-lender, and if he has parted with the same, may order him to indemnify the borrower or person sued.

But the provisions of sect. 1 do not affect the rights of any *bonâ fide* assignee or holder for value without notice (*h*).

The Act confers a new jurisdiction on all the Courts, and is not confined to cases in which Courts of Equity would have given relief before the Act; and excessive interest may of itself show that a transaction is harsh and unconscionable within the meaning of the Act (*i*).

Sect. 2 provides that a money-lender must be registered under his own or usual trade name, and must not enter into any agreement with respect to the advance and repayment of money or take any security as a money-lender otherwise than in his registered name.

(*e*) *Salter* v. *Bradshaw*, 26 Beav. 161. See *Beynon* v. *Cook*, L. R. 10 Ch. 393.

(*f*) *Re Owen*, (1894) 3 Ch. 220.

(*g*) 63 & 64 Vict. c. 51.

(*h*) See sect. 1, sub-sect. 5.

(*i*) *Samuel* v. *Newbold*, (1906) A. C. 461.

Although the Act only purports to impose penalties for non-compliance with the provisions of sect. 2, the Courts have held that non-compliance renders all money-lending contracts and securities void (*k*), even against a defendant who has failed to plead the Act by way of defence (*l*).

But the Money-lenders Act, 1911 (*m*), provides that a security taken by a money-lender shall be valid in favour of a *bonâ fide* assignee or holder for value without notice of any defect due to the operation of sect. 2 of the Money-lenders Act, 1900.

Where the relief asked for could only be obtained in a Court of Equity the money-lender will not be ordered to give up his security except upon the terms that the mortgagor repay the money advanced to him (*n*). If, however, the plaintiff does not ask for equitable relief, but only for a declaration that the mortgage is void, the Court will not impose equitable terms as to repayment of the advance (*o*).

Apart from the Act, a money-lending transaction will be set aside if induced by misrepresentation on a material point, as, for instance, the identity of the lender (*p*).

(*k*) *Bonnard* v. *Dott*, (1906) 1 Ch. 740.

(*l*) *Re Robinson*, (1912) 1 Ch. 717.

(*m*) 1 & 2 Geo. 5, c. 38, s. 1.

(*n*) *Lodge* v. *Nat. Union, &c.*, (1907) 1 Ch. 300.

(*o*) *Chapman* v. *Michaelson*, (1909) 1 Ch. 238.

(*p*) *Gordon* v. *Street*, (1899) 2 Q. B. 641, C. A.

CHAPTER XXXIV.

MORTGAGES WHICH ARE VOID ON GROUNDS OF PUBLIC POLICY.

9 Anne, c. 14.

i.—Securities for Debts incurred in Gaming and Wagering.—By the stat. 9 Anne, c. 14, s. 1, notes, bills, bonds, judgments, mortgages or other securities or conveyances for or in consideration of money lost or lent at play are made utterly void, and all mortgages and incumbrances or conveyances of lands made upon that consideration are made to enure to the use of the person next in remainder or succession, as if the mortgagor were then dead (*a*); and payments made on such securities could not be supported, and might have been recovered back in equity as incidental to the delivery up of such securities (*b*); and the forfeiture of such securities under the first section of the statute of Anne was held not to be a penalty of such a nature as to protect a party from discovering the consideration for the security on which the action at law was brought (*c*).

It was formerly considered that there was a distinction under this statute between money lent and money lost at play, and that, in the former case, the security was avoided, but the contract for payment was good; but it was subsequently decided that where the game was illegal, the contract for payment of money lent or lost at play was void, as well as the security, by the statute of Anne (*d*).

5 & 6 Will. IV. c. 41.

By 5 & 6 Will. IV. c. 41, so much of the above Acts as declares "notes, bills, or mortgages" to be void is repealed, and the said Acts are made to operate as if they had enacted that

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(*a*) See *Smith* v. *Bond*, 11 M. & W. 558.

(*b*) *Rawden* v. *Shadwell*, Amb. 269; *Smith* v. *Bond*, *sup.*; and sect. 2 of the statute of Anne.

(*c*) *Sloman* v. *Kelly*, 4 Y. & C. C. C. 169; and 3 Y. & C. C. C. 673.

(*d*) *M'Kinell* v. *Robinson*, 3 M. & W. 434. And see *Applegarth* v. *Colley*, 10 M. & W. 723, 732; *Thorpe* v. *Coleman*, 1 C. B. 990.

every such "note, bill, or mortgage" should be deemed to have been made, drawn, accepted, given, or executed for an illegal consideration. The Act also repeals that part of the statute of Anne relative to incumbrances on land enuring to the benefit of the remainderman, &c., and enacts that the money paid by the drawer, &c. upon such "bill, note, or mortgage" to the indorsee, holder, or assignee thereof, shall be taken as paid to the use of the party to whom the security was originally given, and be recoverable from him by action at law (*e*).

This Act was passed for the relief of purchasers of such securities for valuable consideration without notice.

But even under the old law the Court would not set aside a judgment founded on a warrant of attorney, given to secure a gaming debt, as against a purchaser, if the debtor had represented before the purchase that the debt was a valid one (*f*).

It may be remarked that 5 & 6 Will. IV. c. 41 only alters the operation of the prior Act as to bills, notes, or mortgages. It has been decided that, as to judgments, the prior Act only avoids voluntary judgments given by the loser at play, either to the winner or to someone for his benefit, as a security for money lost, and does not avoid a judgment obtained adversely by an innocent party, or, as it seems, by the winner himself; but the defendant should set up the illegality of the security as an answer to the action (*g*).

Money lent to pay a gambling debt is not within the stat. 5 & 6 Will. IV. c. 41 (*h*).

Money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, may be recovered in the English Courts (*i*), but a security given for such a loan cannot be enforced in England (*k*).

8 & 9 Vict. c. 109.

The stat. 8 & 9 Vict. c. 109, s. 18 (which repeals so much of the statute of Anne as was not repealed and re-enacted with alteration by the stat. 5 & 6 Will. IV. c. 41), enacts as follows:—

"All contracts or agreements, whether by parol or writing, by

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(*e*) See *Gilpin* v. *Clutterbuck*, 13 L. T. 71, 139, 159.

(*f*) *Davison* v. *Franklin*, 1 B. & Ad. 142.

(*g*) *Lane* v. *Chapman*, 11 A. & E. 966; *Chapman* v. *Lane*, 11 A. & E. 980.

(*h*) *Barjeau* v. *Walmsley*, 2 Stra. 1248; *Exp. Pyke*, 8 Ch. D. 754, C. A.

(*i*) *Saxby* v. *Fulton*, (1909) 2 K. B. 208, C. A.

(*k*) *Moulis* v. *Owen*, (1907) 1 K. B. 746, C. A.

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way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained at law or in equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or deposited in the hands of any person to abide the event on which any wager shall have been made; provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money, to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

The Act also (sect. 17) makes a party who wins money, &c. by way of fraud practised in gaming or wagering, punishable as obtaining money under false pretences.

55 & 56 Vict. c. 9.

It is enacted by the Gaming Act, 1892 (*l*), that—

Promises to repay sums paid under contracts void by 8 & 9 Vict. c. 109, to be null and void.

"Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

This Act sets aside the law laid down by the Court of Appeal in *Read* v. *Anderson* (*m*).

Effect of this Act.

The Act has been applied so as to refuse any remedy to an agent who had paid money on express instructions from his principal, though it was not stated in the affidavits that the agent had any knowledge that the money was paid in respect of debts (*n*). The Act has been held not to be retrospective (*o*).

The result seems to be as follows:—

That any gaming or wagering contract, agreement, or promise is now clearly void, and cannot be enforced:

That securities given for money won by any gaming or wagering, or for repayment of moneys paid by another person on behalf of and at the request of a loser (or at least, bills, notes, and mortgages given as such securities), though now no longer totally void, can be enforced by a transferee for valuable consideration without notice, and by no other person (*p*):

(*l*) 55 & 56 Vict. c. 9.

(*m*) 13 Q. B. D. 779.

(*n*) *Tatam* v. *Reeve*, (1893) 1 Q. B. 44.

(*o*) *Knight* v. *Lee*, (1893) 1 Q. B. 41.

(*p*) See the preamble of the Act of Will. IV., which seems to warrant

That if voluntary judgments and securities other than "bills, notes, and mortgages" be untouched by the statute of Will. IV., yet it would seem that the statute of Victoria would be a bar to their being enforced independently of the ordinary doctrines of law and equity; and in such case a purchaser for valuable consideration, holding such judgment or security, would seem not to be protected:

That judgments recovered adversely against the loser remain as before the late Acts:

That gaming securities may be set aside and ordered to be delivered up (*q*):

That at common law money paid by the loser to the winner can only be recovered back while the contract is executory (*r*):

That probably the Court still could, on setting aside gaming securities, decree money paid on them to be repaid (*s*). The ground, however, on which *Rawden* v. *Shadwell* (*t*) was decided, viz., that the security was totally void by the statute, is now gone; and it must be observed that, in that case, only part of the money secured had been paid:

That money paid to the transferee of gaming securities, or, at least, of a bill, note, or mortgage, for valuable consideration without notice, is recoverable from the party to whom the security was originally given, as money paid for his use (*u*).

The distinction between these cases and those in which the transaction is illegal and subject to penalties is obvious (*x*).

Deposit with stakeholder.

But it would seem that money deposited with a stakeholder cannot now, on the ground of playing for ready money, be recovered by the winner (*y*); though it seems that any one of the depositors who has repudiated the wager before the time fixed

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this assertion, and also to bring other securities besides bills, notes, and mortgages within the scope of the Act. See *Hawker* v. *Hallewell*, 2 Sm. & G. 194, affirmed on other grounds, 2 Jur. N. S. 794.

(*q*) See *Rawden* v. *Shadwell*, Amb. 269; *Wynne* v. *Callander*, 1 Russ. 293. See Story's Eq. Jur. s. 303.

(*r*) See *Hastelow* v. *Jackson*, 8 B. & Cr. 225.

(*s*) See *Rawden* v. *Shadwell*, *sup.* But see the judgment of Lord Talbot, in *Bosanquet* v. *Dashwood*, Cas. t. Talb. (Williams), 38.

(*t*) Amb. 269.

(*u*) 5 & 6 Will. IV. c. 41; *Gilpin* v. *Clutterbuck*, 13 L. T. 71, 139, 159, Q. B.; *Jessopp* v. *Lutwyche*, 10 Exch. 614; *Rosewarne* v. *Billing*, 15 C. B. N. S. 316; *Fitch* v. *Jones*, 5 E. & B. 238.

(*x*) *Fisher* v. *Bridges*, 3 E. & B. 642.

(*y*) See *Applegarth* v. *Colley*, 10 M. & W. 723; *Corney* v. *Plimmer*, (1897) 1 Q. B. 634, C. A.

for its determination, or even before the money is paid over, may recover back the sum deposited by him from the stakeholder, as fully as he could before the Act (*z*).

Deposit of securities as cover for dealings in stocks and shares.

Where both parties to contracts for the sale and purchase of stocks intend that no stock shall be delivered, and that "differences" only shall be accounted for, the mere fact that the contracts provide that either party may require completion of the purchase and delivery or receipt of the stock, does not prevent them from being contracts by way of gaming and wagering within the Gaming Act, 1845, s. 18, and therefore void. In such transactions, therefore, securities deposited to secure the payment of the differences are recoverable by action (*a*).

Subscriptions to prizes.

It seems that the effect of the proviso at the end of sect. 18 of the stat. of Victoria is to render valid, or rather to save out of the operation of the former part of the clause, any subscription or contribution to abide the event of a lawful game, though the subscribers themselves are the parties engaged in the game, and that the winner may recover the money so subscribed or agreed to be subscribed (*b*); and thus, where a foot race or horse race takes place between two or more parties, each of whom deposits a sum with a stakeholder, such deposit may be recovered by the winner; and yet, by a strange anomaly, the security given for such money may be illegal, and money paid on such security may, perhaps, be recovered back under the statutes of Anne and Will. IV. (*b*).

Horse racing.

In *Applegarth* v. *Colley* (*c*), before the statute of Victoria, a horse race for money, raised by the parties themselves, was said to be within the statute of Anne; but it was said that, since the repeal of 13 Geo. II. c. 19, by 3 & 4 Vict. c. 5, there was nothing to prevent a race for a sum of money given by a stranger by way of prize.

Horse racing was, by 13 Geo. II. c. 19, declared to be illegal, unless the stake was 50*l.* at least, or the race was held in certain places named in the Act. But wagers even on such legal races

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(*z*) *Varney* v. *Hickman*, 5 C. B. 271; 17 L. J. C. P. 102. And see *Hastelow* v. *Jackson*, 8 B. & Cr. 225; *Hodson* v. *Terrill*, 1 Cr. & M. 797; *Gatty* v. *Field*, 9 Q. B. 431.

(*a*) *Universal Stock Exchange* v. *Strachan*, (1896) A. C. 166; *Re Gieve*, (1899) 1 Q. B. 794; but see *Stubbs* v. *Slater*, (1910) 1 Ch. 632.

(*b*) *Batty* v. *Marriott*, 5 C. B. 818; 17 L. J. C. P. 215.

(*c*) 10 M. & W. 723.

were illegal, at least if exceeding 10*l.* (*d*), and, it seems, are void in all cases, since 8 & 9 Vict. c. 109, s. 18.

Where judgment has been obtained in an action on the contract, in which the illegality within the above statutes was not set up, it cannot be impeached (*e*).

By 18 Geo. II. c. 34, courts of equity were empowered to make a decree in suits to enforce payment under transactions contrary to 9 Anne, c. 14, and in several cases have accordingly given relief by ordering the delivery up of securities (*f*).

9 Anne, c. 14, enacted (*g*) that persons liable to be sued for money or valuables under the statute should be compelled to give discovery (*h*). The repeal by 8 & 9 Vict. c. 109 of the Act of Anne, and of that part of the Act of Geo. II. which relates to it, appears to leave the matter subject to the general rules of courts of equity, concerning answers which would expose a defendant to criminal prosecution.

If a loan be placed by the lender in the hands of the borrower as the lawful owner of it to dispose of as he pleases, a security for its repayment will be good, although the lender may have expected to be paid out of it the amount of bets won by him from the borrower; but if it were lent under an agreement that the bets should be paid out of it, the security will be bad as a colourable evasion of 9 Anne, c. 14, and 5 & 6 Will. IV. c. 41 (*i*).

A bond to secure moneys agreed to be paid to avoid being posted as a defaulter for non-payment of racing debts, is good (*k*).

Stock-jobbing transactions.

The enactments in restraint of stock-jobbing have been abrogated (*l*), and, accordingly, securities given for moneys payable in respect of such transactions are no longer impeachable on the ground of illegality of the consideration, unless such transactions are in fact gambling transactions (*m*).

The rights of a broker in respect of a broker's lien or under the rules of the Stock Exchange are not the same as the rights

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(*d*) *Goodburn* v. *Marley*, 2 Stra. 1159; *Shillito* v. *Theed*, 7 Bing. 405; *Pugh* v. *Jenkins*, 1 Q. B. 631; *Greville* v. *Chapman*, 8 Jur. 190, Q. B.

(*e*) *Lane* v. *Chapman*, 11 A. & E. 966, 980.

(*f*) *Newman* v. *Franco*, 2 Anst. 519; *Andrews* v. *Berry*, 3 Anst. 634; *Rawden* v. *Shadwell*, Amb. 269; *Wynne* v. *Callander*, 1 Russ. 293; *Parker* v. *Alcock*, Yo. 361.

(*g*) Sect. 3.

(*h*) *Earl Lichfield* v. *Bond*, 6 Beav. 88.

(*i*) *Hill* v. *Fox*, 4 H. & N. 359.

(*k*) *Bubb* v. *Yelverton*, L. R. 9 Eq. 471. And see, as to the legality of such a debt in other respects, *Johnson* v. *Lansley*, 12 C. B. 468.

(*l*) 23 Vict. c. 28.

(*m*) *Supra*, p. 644.

of a mortgagee under an express contract of mortgage (*n*). In the absence of special agreement to the contrary, a stockbroker has a general lien on a client's securities which are in his hands in the course of business (*o*).

The rules of the Stock Exchange only apply to members *inter se*. Therefore, where brokers acting for an outside principal pledge shares with a jobber as security for a loan, the relation of mortgagor and mortgagee exists between the principal and the jobber, and the latter is bound to account (*p*).

Consideration of future cohabitation.

ii.—Immoral Securities.—Securities given for an immoral consideration are void; as where a mortgage or annuity is given to a woman in consideration of future illicit intercourse with the grantor (*q*); in a case of this kind the Court ordered the bond to be delivered up, and set aside a judgment and other proceedings upon it (*r*).

Consideration of past cohabitation.

A distinction, however, is made where the security is given as *premium pudicitiæ* in consideration of a cohabitation which has determined, which has been said to be a "lawful and conscientious" consideration (*s*), on the ground that such a course enables the woman to lead a course of life more conducive to her own happiness and to public morality.

It is now settled, after some difference of opinion (*t*), that the Court will not relieve against a security given in consideration of past cohabitation, even though the defendant is proved to be a common prostitute (*u*).

Cohabitation with married man.

If, however, the consideration be a past cohabitation with a married man, equity will not assist the woman to enforce the security, if she knew that the defendant was a married man (*x*), but if there are children, the Court will regard their interests (*y*); and in such a case the Court will enforce a security for payment of money as a provision for the woman and her children.

(*n*) *Deverges* v. *Sandeman & Co.*, (1902) 1 Ch. 579, per Cozens-Hardy, L.J.

(*o*) *Re London and Globe Finance Corp.*, (1902) 2 Ch. 416; *post*, Chap. LIX., Sect. 4 (vii.).

(*p*) *Ponsolle* v. *Webber*, (1908) 1 Ch. 254.

(*q*) *Friend* v. *Harrison*, 2 C. & P. 584; *Rex* v. *Northwingfield*, 1 B. & Ad. 912; *Batty* v. *Chester*, 5 Beav. 103; *Smythe* v. *Griffin*, 13 Sim. 245; *Evans* v. *Carrington*, 30 L. J. Ch. 370; *Bullmore* v. *Willyams*, 32 Beav. 574.

(*r*) *James* v. *Hoskins*, 1 Tidd. Pr. 593.

(*s*) *Turner* v. *Vaughan*, 2 Wils. K. B. 339.

(*t*) *Whaley* v. *Norton*, 1 Vern. 484.

(*u*) *Hill* v. *Spencer*, Ambl. 641.

(*x*) *Priest* v. *Parrot*, 2 Ves. Sen. 160.

(*y*) *Knye* v. *Moore*, 1 S. & St. 61.

Security must be by deed.

It must be borne in mind that the consideration of past cohabitation, though meritorious, is not valuable (*z*), and accordingly will not support a security for payment of money unless the instrument creating the security is under seal and executed (*a*); for in matters executory, even on the consideration of *premium pudicitiæ*, the Court will not compel the party or his executors to fulfil an agreement to provide for a forsaken mistress.

Continuance of cohabitation.

Where a security is given by a man to his mistress in consideration of past cohabitation, the continuance of the cohabitation is not of itself sufficient to raise the presumption that the security is given in consideration of a continuance of the connection (*b*). No *turpis contractus* shall be presumed unless proved (*c*).

Loss of deed creating security.

If the instrument creating a security given in consideration of past cohabitation is lost or destroyed, it would seem that the grantee may have her remedy in equity notwithstanding (*d*); but "these matters are discretionary" (*e*), and there are some old cases to the contrary (*f*).

Marriage brocage.

iii.—Other Invalid Securities.—Securities given as a reward for procurement of marriage (commonly called marriage brocage) with a particular person are also void as contrary to that freedom of choice in marriage which is encouraged by public policy. Such securities may be ordered to be delivered up, and sums already paid under them to be returned (*g*).

Securities for obtaining sale of public office.

Upon the same principle of public policy, securities given for obtaining or for procuring the sale of a public office of trust are void, whether the office be or be not one the sale of which is forbidden by statute (*h*).

Compounding felony.

Where the security is the result of an illegal agreement to

(*z*) *Beaumont* v. *Reeve*, 10 Jur. 284, Q. B.; *Binnington* v. *Wallis*, 4 B. & Ald. 650; *Gibson* v. *Dickie*, 3 M. & S. 463, is not law.

(*a*) *Matthews* v. *L——*, 1 Madd. 558; *Whaley* v. *Norton*, 1 Vern. 483.

(*b*) *Re Vallance, Vallance* v. *Blagden*, 26 Ch. D. 353.

(*c*) *Lightbone* v. *Weedesh*, 1 Eq. Ca. Ab. 24, pl. 7; 93, pl. 5.

(*d*) *Underwood* v. *Staney*, 1 Ch. Ca. 78; *Lightbone* v. *Weedesh*, *sup.*

(*e*) 1 Eq. Ca. Ab. 62, pl. 4.

(*f*) *Miller* v. *Reames*, 1 Roll. Abr. 375, Chancery (Q), pl. 1; *Vincent* v. *Beverlye*, Noy, 82. See *Toulmin* v. *Price*, 5 Ves. 235.

(*g*) *Stribblehill* v. *Brett*, 2 Vern. 445; *Smith* v. *Bruning*, 2 Vern. 392; *Williamson* v. *Gihon*, 2 Sch. & Lef. 356, 362; *Hermann* v. *Charlesworth*, (1905) 2 K. B. 123.

(*h*) *Law* v. *Law*, 3 P. Wms. 391; *Stackpole* v. *Earle*, 2 Wils. K. B. 133.

compound a felony it will be void (*i*); but a security given for a debt actually owing will not be avoided merely because it appears that the creditor was thereby induced to abstain from prosecution (*k*).

A deposit by a married woman of securities held to her separate use to cover a loss occasioned to the plaintiff by the felony of her husband, upon condition of the charge being withdrawn, is illegal (*l*).

Consideration partly illegal.

The circumstance that part of the consideration for a mortgage is illegal, vitiates the security only to the extent of the illegal consideration (*m*).

(*i*) *Ward* v. *Lloyd*, 6 M. & Gr. 785.

(*k*) *Flower* v. *Sadler*, 10 Q. B. D. 572, C. A. See *Williams* v. *Bayley*, L. R. 1 H. L. 200; *Seear* v. *Cohen*, 45 L. T. 589.

(*l*) *Whitmore* v. *Farley*, W. N. (1881) 8; 45 L. T. 99.

(*m*) *Sheehy* v. *Sheehy*, (1901) 1 Ir. R. 239.

Part V.

THE ESTATE, RIGHTS, LIABILITIES, AND REMEDIES OF THE MORTGAGOR AND PERSONS CLAIMING UNDER HIM.

CHAPTER XXXV.

THE NATURE AND INCIDENTS OF AN EQUITY OF REDEMPTION.

Mortgagor had at common law no estate, but only a right of re-entry.

i.—Equity of Redemption is an Estate.—It has been already shown that, by the common law, the legal ownership of the land, on the execution of the deed of mortgage, is transferred to the mortgagee, subject to be divested on performance of the condition, and that a mere right of re-entry on performance of the condition remains in the mortgagor, of which, being neither alienable nor devisable prior to the modern statutes (*a*), advantage might be taken only by him or his heirs.

Application of this doctrine in equity.

In an early case (*b*) these doctrines were applied in equity to the right to redeem after condition broken; and it was there held that an equity of redemption was a mere right, and was not an estate of inheritance capable of being entailed under the statute *De Donis* (*c*).

Equity of redemption held to be an estate in the mortgagors.

In the leading case of *Casborne* v. *Scarfe* (*d*), however, Lord Hardwicke, C., stated the settled rule of equity to be that an equity of redemption is to be deemed an estate in the land, for that it may be devised, granted, or entailed with remainders, and such entail and remainders might be barred by fine or recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin. The person, therefore, entitled to the equity of redemption is considered as owner of the land.

(*a*) See 1 Vict. c. 26, s. 3, and 8 & 9 Vict. c. 106, s. 6, by which rights of entry are made devisable and alienable by deed: Carson, R. P. Stat. (2nd ed.) 442, 523.

(*b*) *Roscarrick* v. *Barton*, 1 Ch. Ca. 217.

(*c*) 13 Edw. I. c. 1.

(*d*) 1 Atk. 602.

Chap. XXXV. (i.)

It is now an established doctrine of equity that the mortgagor is, until foreclosure, the real owner of the property, and possessed of it in right of his ancient and original estate (*e*).

But the doctrine as to the equity of redemption being an estate in land is a comparatively modern doctrine, and however great may be the value of the rights with which equity and legislation have clothed the mortgagor he has neither legal title nor more than a precarious kind of possessory enjoyment (*f*). A mortgagor therefore in possession of customary freeholds is not so "seised" on his death as to entitle the lord to claim a heriot pursuant to the custom of the manor (*g*).

ii.—Personal Rights and Privileges of Mortgagor.—With whatever strictness the common law may have originally regarded the breach of the condition by the mortgagor, yet, in modern times, the doctrine of the courts of equity, recognizing the mortgagor (until foreclosure) to be the actual owner of the land, has to a certain extent, with reference to the possession by the mortgagor, been acted upon as well by the courts of common law as by the legislature.

Vote for Parliament.

The statute law (*h*) has provided that the mortgagor in possession shall have the privilege of voting for the return of members of Parliament notwithstanding the mortgage. If, however, the interest on the mortgage reduces the annual value below 40*s*., the mortgagor has no vote (*i*); but nothing but interest can be deducted (*k*). The monthly payments, however, secured by mortgage to trustees of a benefit building society under 6 & 7 Will. IV. c. 32, are a charge on the estate which will destroy the owner's right to vote if they do not leave him the requisite quantity of interest prescribed by statute (*l*).

Holding courts.

He has the right of holding courts where lord of a manor (*m*).

Nomination to benefice.

A further privilege annexed to the estate of the mortgagor is

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(*e*) See per Lord Selborne in *Heath* v. *Pugh*, 6 Q. B. D. 345, at p. 360, and per Kekewich, J., in *Tarn* v. *Turner*, 39 Ch. D. 456, at p. 460.

(*f*) *Copestake* v. *Hoper*, (1908) 2 Ch. 10, per Kennedy, L.J.

(*g*) *Ibid.*

(*h*) 8 Hen. VI. c. 7; 2 & 3 Will. IV. c. 45, s. 23; and 6 & 7 Vict. c. 18, s. 74.

(*i*) Bedfordshire, 2 Lud. 469; Middlesex, 2 Peckw. 103; *Lee* v. *Hutchinson*, 8 C. B. 18; 2 Lutw. Reg. Ca. 159.

(*k*) *Rolleston* v. *Cope*, L. R. 6 C. P. 292.

(*l*) *Copland*, app., *Bartlett*, resp., 6 C. B. 18.

(*m*) *Ante*, p. 176.

the right, where an advowson is the subject of the mortgage, of nominating to the church on an avoidance of the living (*n*).

Director's qualification not lost by mortgage of shares.

Though by the articles a director of a company must be a registered member in his own right, he does not lose his qualification by an equitable mortgage of his shares (*o*), nor by a mortgage of them by an unregistered deed of transfer (*p*).

Poor law settlement.

At common law the title of ownership of a mortgagor while in possession is so far recognized as to gain him a settlement under the poor laws (*q*), but for this purpose he must reside within ten miles of the property (*r*), and be in possession in his capacity as mortgagor, and not by fraud or wrong; and in a case (*s*) in which a mortgagee of several messuages having recovered in ejectment, afterwards permitted the mortgagor to inhabit one of the houses for a particular purpose, *i.e.*, the overlooking of some repairs, the Court of King's Bench held that no settlement was gained by such latter residence, for he was not in possession as mortgagor.

Right to bring and defend actions.

iii.—Right of Mortgagor to bring or defend Actions with regard to the Mortgaged Property.—By the Judicature Act, 1873 (*t*), s. 25, it is enacted as follows:—

Suits for possession of land by mortgagors.

> "(5.) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

The mortgagor may defend actions relating to the land or other property subject to the mortgage as against persons other than the mortgagee (*u*).

When the mortgagee must be party

As a general rule, where an action is brought by or against a person having only an equitable interest in property which

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(*n*) *Mackenzie* v. *Robinson*, 3 Atk. 559, which overruled *Gardiner* v. *Griffith*, 2 P. Wms. 403. And see *ante*, p. 177.

(*o*) *Pulbrook* v. *Richmond, &c. Co.*, 9 Ch. D. 610; *Cumming* v. *Prescott*, 2 Y. & C. Ex. 488. See *Howard* v. *Sadler*, (1893) 1 Q. B. 1.

(*p*) *Ibid.; Bainbridge* v. *Smith*, 41 Ch. D. 463, C. A.

(*q*) *Rex* v. *Inh. of Catherington*, 3 T. R. 771.

(*r*) 4 & 5 Will. IV. c. 76, s. 68, a.

(*s*) *Rex* v. *Inhabitants of Catherington*, 3 T. R. 771.

(*t*) 36 & 37 Vict. c. 66.

(*u*) *Sellick* v. *Smith*, 11 Moo. 459.

to actions respecting equity of redemption.

is the subject-matter of the action, the person in whom the legal estate is vested must be made a party thereto, so as to bind the legal estate, and to prevent the owner of it from molesting the party against whom relief is sought by further proceedings (*x*). So, the mortgagee must be made a party if his interests are in any way likely to be prejudiced by the result of an action brought by or against the mortgagor. Thus, if the action is for recovery of land subject to a mortgage, the mortgagee in whom the legal estate is vested must be made a party (*y*). So, also, if the matter in dispute involves the taking of accounts, he must be a party, so as to bind him by the accounts (*z*).

When the mortgagee need not be a party.

But if the relief sought in no way prejudices or affects the mortgagee's interest, he need not be made a party to an action by or against the mortgagor. So, a mortgagor in receipt of the rents and profits of land has been held to be entitled to maintain an action for an injunction to restrain the injury done to the mortgaged property without making the mortgagee a party (*a*). And where a registered owner of a patent which was subject to a mortgage brought an action claiming an injunction and damages for infringement, it was held that he might maintain his action without making the mortgagee a party, but without prejudice to any application by the defendant to have the mortgagee made a party if circumstances should render it necessary to do so (*b*). So, also, a mortgagor may enforce specific performance of an agreement relating to the mortgaged property, without making the mortgagee a party, if the interests of the latter will not be affected by the decision of the matter in dispute (*c*).

Adding parties.

No person can be added as a plaintiff in any cause or matter without his own consent in writing thereto (*d*). If a mortgagee is a necessary party to an action, and declines to be joined as plaintiff, the Court will order him to be added as defendant (*e*).

(*x*) Dan. Ch. Pr. vol. i. p. 172. See *Wood* v. *Williams*, 4 Madd. 186; *Hickens* v. *Kelly*, 2 Sm. & G. 264.

(*y*) *Allen* v. *Woods*, 68 L. T. 143; cf. *Matthews* v. *Usher*, (1900) 2 Q. B. 535.

(*z*) *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge, &c. Soc.*, 44 Ch. D. 374, at p. 392, C. A.

(*a*) *Fairclough* v. *Marshall*, 4 Ex. D. 37.

(*b*) *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge, &c. Soc.*, 44 Ch. D. 374, C. A.

(*c*) *Francklyn* v. *Fern*, Barn. Ch. R. 30, 32; *Tasker* v. *Small*, 3 My. & Cr. 63; *Sanders* v. *Richards*, 2 Coll. 568. And see *Ford* v. *Tennant*, 3 De G. F. & J. 695.

(*d*) R. S. C., Ord. XVI. r. 11.

(*e*) *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge, &c. Soc.*, 44 Ch. D. 374, at p. 394, C. A.

Whether mortgagor must offer to redeem.

If the mortgagor brings an action relating to the mortgaged property, and finds it necessary to make the mortgagee a party in order that the relief sought may bind the interest of the latter, the mortgagor must offer to redeem (*f*). So a mortgagor of an undivided share cannot sue for partition without first redeeming the mortgage on his share (*g*). But a mortgagor may apply by originating summons for the determination of a question of construction arising under the mortgage deed without offering to redeem (*h*).

Multifarious actions by mortgagor.

If a mortgagor brings an action in which he mixes up several distinct matters, in some of which the mortgagee has no concern, so that he is not a necessary party in regard to them, even an offer to redeem will not be sufficient. Formerly, in such a case, the bill would have been demurrable by the mortgagee for multifariousness; and under the present practice the mortgagee may have the action dismissed as against him with costs, and the Court may order the pleadings, so far as they affect him, to be struck out (*i*), or may order a separate action to be brought (*k*).

Action in name of mortgagee.

Independently of sect. 25 (5) of the Judicature Act, 1873, a mortgagor, indemnifying the mortgagee in respect of costs, is entitled, if necessary, to take proceedings in the name of the mortgagee to recover or protect the mortgaged property (*l*).

Whether assignee *pendente lite* is a necessary party.

If the subject-matter of an action is a disputed claim of right or title to property, and a party, whether plaintiff or defendant, mortgages his interest *pendente lite*, the question will arise whether the mortgagee is a necessary or proper party to the action.

Notice of *lis pendens*.

The registration of a *lis pendens* relating to land will affect a mortgagee with notice of the claim which is the subject of the action (*m*), and bind him by its result accordingly, provided the plaintiff has, previously to the mortgage, sufficiently indicated the real estate sought to be charged in the action (*n*); and accordingly such a mortgagee need not be made a party, even though the plaintiff is aware of the mortgage.

(*f*) *Hughes* v. *Cook*, 34 Beav. 407.

(*g*) *Sinclair* v. *James*, (1894) 3 Ch. 554.

(*h*) *Nobbs* v. *Law Reversionary Soc.*, (1896) 2 Ch. 830.

(*i*) Ord. XIX. r. 27.

(*k*) *United Telephone, &c. Co.* v. *Tasker*, 59 L. T. 852.

(*l*) *Phéné* v. *Gillan*, 5 Ha. 1.

(*m*) See further as to notice by registration of *lis pendens*, *post*, Chap. LVIII., Sect. II. (vi).

(*n*) *Price* v. *Price*, 35 Ch. D. 297.

The doctrine of *lis pendens* is confined to real estate and leaseholds, and has no application to goods and chattels (*o*).

Assignees *pendente lite* not generally necessary parties.

Prior to the statute 2 & 3 Vict. c. 11, requiring registration of *lis pendens*, the general rule was that assignees *pendente lite* were not necessary or proper parties to an action claiming right or title to property. Such an assignment was inoperative to vary the rights of the parties in that action as between themselves, and consequently the assignee, though not a party, would be bound by the judgment (*p*).

Exception where legal estate vested in him, &c.

If, however, the absence of the assignee would have prejudiced rights or interests of other parties to the action, it was proper to make him a party, as, for instance, if the legal estate had been conveyed to him (*q*); or if the title deeds have been handed over to him; or if other incidental or consequential relief is asked for requiring something to be done by the assignee (*r*).

Exception as to matters of account, &c.

Again, if no right or title to the property, which is the subject-matter of the action, is in dispute, but the question is merely one of administration or account, it would seem that an assignee *pendente lite*, who is, whatever the event of the action may be, entitled to a valid interest in the property, and concerned in any order which may be made affecting it, is a proper party to the action (*s*).

Effect of 2 & 3 Vict. c. 11.

It would seem that since the statute 2 & 3 Vict. c. 11, when a suit has not been duly registered, a legal assignee *pendente lite* not having actual notice of the suit will not be bound, unless he is made a party; but that if he has not acquired the protection of the legal estate, the old rule will apply, and accordingly he will be bound though not a party.

Continuance of action after assignment.

According to the present practice a cause or matter does not become defective by the assignment of any estate or title *pendente lite*, but in such a case the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved; and where, by reason of a change

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(*o*) *Wigram* v. *Buckley*, (1894) 3 Ch. 483, C. A.

(*p*) Per Sir T. Plumer, V.-C., in *Metcalfe* v. *Pulvertoft*, 2 V. & B. 200, at p. 205. See *post*, Chap. LVIII., Sect. II. (vi).

(*q*) *Daly* v. *Kelly*, 4 Dow, 435.

(*r*) See *Higgins* v. *Shaw*, 2 Dr. & War. 356, 362; *Landon* v. *Morris*, 5 Sim. 247, 269; *Wood* v. *Surr*, 19 Beav. 551; *Massy* v. *Batwell*, 4 Dr. & War. 58, at pp. 68, 80; *MacLeod* v. *Annesley*, 16 Beav. 607.

(*s*) *Solomon* v. *Solomon*, 13 Sim. 516. As to parties to actions for redemption, see *post*, Chap. XXXVIII., Sect. II.; as to foreclosure, see *post*, Chap. XLIX., Sect. I. (iv).

or transmission of interest, it becomes necessary or desirable that any person not already a party shall be made a party, an order that the proceedings shall be carried on between the continuing parties and such new party may be obtained *ex parte* upon an allegation of such transmission of interest (*t*).

Sale by mortgagor.

iv.—Sale, Mortgage, &c. of Equity of Redemption.—A mortgagor, being the owner of the mortgaged property, may dispose of the equity of redemption therein.

Purchase by mortgagee.

A mortgagee may, pursuant to an agreement subsequent to and independent of the mortgage transaction, purchase the equity of redemption (*u*).

Where a mortgagee in fee has purchased the equity of redemption, and taken a conveyance of it to himself, a conveyance from his trustee, in whom the legal estate was vested by the mortgage deed, will be presumed (*x*).

Abandonment of contract after lapse of time.

Where a mortgagor executed an agreement to release the equity of redemption to the mortgagee, and the agreement was not acted upon for twelve years, during which period the mortgagor continued in possession, when the mortgagee sold the property under his power of sale, it was held that the agreement must be treated as abandoned, and that the mortgagor was entitled to the surplus proceeds of the sale (*y*).

Champerty.

A mortgagor may also assign any rights incident to his ownership of the equity of redemption (*z*). So it would seem that an assignment of a claim to reduce a conveyance into a mortgage is not champerty; in bankruptcy, at any rate, the trustee can sell such a right (*a*).

Discharge of incumbrances on sale.

The sale of incumbered estates is much facilitated by sect. 5 of the Conveyancing Act, 1881 (*b*), which enacts as follows:—

Provision by Court for incumbrances, and sale freed therefrom.

Sect. 5.—"(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a deter-

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(*t*) R. S. C., Ord. XVII. rr. 1, 3, 4. See *Kino* v. *Rudkin*, 6 Ch. D. 160; *Campbell* v. *Holyland*, 7 Ch. D. 166; *Pennington* v. *Cayley*, (1912) W. N. 158.

(*u*) *Ante*, p. 21.

(*x*) *Noel* v. *Bewley*, 3 Sim. 103.

(*y*) *Rushbrooke* v. *Lawrence*, L. R. 5 Ch. 3. See also *Harris* v. *Horwell*, Gilb. 11.

(*z*) *Steers* v. *Rogers*, (1893) A. C. 232 (patent rights).

(*a*) *Hartley* v. *Russell*, 2 S. & St. 244. See *Seear* v. *Lawson*, 15 Ch. D. 426, 434, C. A.

(*b*) 44 & 45 Vict. c. 41, s. 5.

minable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

"(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

"(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

"(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made."

Definition of incumbrance.

An "incumbrance," within the meaning of this section, includes "a mortgage in fee or for any less estate, and a trust for securing money," as well as other charges, "and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof" (*c*). It is doubtful whether the section applies to statutory rent-charges (*d*), but it applies to land charged with legacies (*e*), and to property charged with legacies and annuities, even though a fund has been set aside to meet them (*f*).

Application by summons.

An application for an order under this section must be by summons at chambers; notice of the application must be served on parties interested; and the costs are in the discretion of the Court (*g*). But by the Conveyancing Act, 1911 (*h*), the Court

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(*c*) 44 & 45 Vict. c. 41, s. 2 (vii).

(*d*) *Re G. N. Rly. and Sanderson*, *inf.*

(*e*) *Archdale* v. *Anderson*, 21 L. R. Ir. 527.

(*f*) *Re Evans and Bettell*, (1910) 2 Ch. 438.

(*g*) 44 & 45 Vict. c. 41, s. 69, sub-ss. (3), (4), (5), (6), (7). See *Patching* v. *Bull*, 30 W. R. 244; *Dickin* v. *Dickin*, 30 W. R. 887; *Milford Haven Rail., &c. Co.* v. *Mowatt*, 28 Ch. D. 402. For forms of orders, see Seton (7th ed.), 327.

(*h*) 1 & 2 Geo. V. c. 37, s. 1.

may dispense with the service of notice on the purchaser or vendor.

The jurisdiction of the Court under this section is discretionary. An application by a purchaser under this section was dismissed, where it was shown that an order directing the vendor to pay money into Court for the purpose of discharging an incumbrance on the land contracted to be sold would inflict great hardship upon him, inasmuch as the amount required for the purpose would have largely exceeded the amount of the purchase-money (*i*).

The Court will not act under this section, except in view of a particular sale (*k*). But the Court will, for the purpose of bringing the section into play, decide questions of construction involving the determination of future rights (*l*).

An order under this section was made upon a sale of mortgaged property by the mortgagor's trustee in bankruptcy, though proceedings were pending to set aside the mortgage on the ground of fraudulent preference (*m*).

Where an application under this section is made in an action to which the incumbrancer, whose charge is intended to be provided for, is not a party, the order should follow the words of the statute, and, after directing payment into Court of the purchase-money, and the setting aside of an amount sufficient to meet the incumbrance, should proceed to declare that thereupon any party should be at liberty to apply in Chambers for a declaration that the land is free from the incumbrance (*n*).

Mortgage of equity of redemption.

An equity of redemption may itself become the subject of mortgage, and each equitable mortgagee will generally have preference according to his priority in time. Of the protection afforded by the statute law to the mortgagee of an equity of redemption, and by what means a subsequent mortgagee of the equity of redemption may obtain preference to a prior mortgagee of the equity, an explanation is given in other parts of this treatise (*o*).

(*i*) *Re Great Northern Rail. Co. and Sanderson* 25 Ch. D. 788. See *Re Jackson and Oakshott*, 14 Ch. D. 851.

(*k*) *Patching* v. *Bull*, 30 W. R. 244; aff. W. N. (1882) 113.

(*l*) *Re Freme's Contract*, (1895) 2 Ch. 778.

(*m*) *Milford Haven Rail. &c. Co.* v. *Mowatt*, 28 Ch. D. 402.

(*n*) *Dickin* v. *Dickin*, *sup.*

(*o*) *Ante*, Chap. VII.; *post*, Chap. LV.

Enlargement of long term.

It would seem that the mortgagor of a long term, when the mortgage is by demise, may enlarge the term into a fee simple whether he is in possession or not; but if the mortgage is by assignment he would only be entitled to do so while in possession, for when out of possession he is not "beneficially entitled in right of the term" (*p*).

A mortgagee whether by demise or assignment if out of possession clearly has no power to enlarge; and *quære* whether a mortgagee by assignment in possession has any such power.

Leases.

The powers of mortgagors to lease mortgaged lands without the concurrence of their mortgagees will be considered later (*q*).

Partition.

Where there is an overriding mortgage of the entirety of an estate, partition will be decreed of the equity of redemption subject to the mortgage without the mortgagee being made a party to the action (*r*). Of course, the power of sale under a mortgage of the entirety is paramount to a partition (*s*). But the circumstance that one co-owner has procured a transfer to himself of a mortgage over the entirety and is in possession does not prevent an action for partition being brought against him by another co-owner (*t*).

Mortgage of share to co-tenant.

A tenant in common whose share is subject to a mortgage cannot enforce a partition or sale against the wish of his mortgagee, except upon the terms of paying off the mortgage (*u*).

Priority as between mortgagee of share and co-owner.

Where the owner of an undivided share of land executed a legal mortgage of his share and remained in possession, on the sale of the property in a partition action, it was held that the claim of the mortgagor's co-owner in respect of occupation rent due from the mortgagor could not be paid out of the latter's share of the proceeds of sale in priority to the mortgagee (*x*).

When mortgagee may require sale in lieu of partition.

Where, in a partition action, the mortgagees, to the extent of a moiety in value of the property, desired a sale of the property and a distribution of the proceeds in lieu of partition, but the owners of the equity of redemption desired a partition, it was held that the Court had a discretion, under sect. 3 of the Partition Act, 1868 (*y*), to order a sale of the property, and that,

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(*p*) 44 & 45 Vict. c. 41, s. 65.

(*q*) *Post*, Chap. XXXVII.

(*r*) *Swan* v. *Swan*, 8 Pri. 518; *Sinclair* v. *James*, (1894) 3 Ch. 554.

(*s*) *Re Norris*, W. N. (1883) 65; *Sinclair* v. *James*, *sup.*

(*t*) *Waite* v. *Bingley*, 21 C. D. 674, 683.

(*u*) *Gibbs* v. *Haydon*, 30 W. R. 726; *Sinclair* v. *James*, *sup.*

(*x*) *Hill* v. *Hickin*, (1897) 2 Ch. 579, doubting *Heckles* v. *Heckles*, W. N. (1892) 188.

(*y*) 31 & 32 Vict. c. 40; Carson, R. P. Stat. (2nd ed.) 743.

as the mortgagees were persons interested "to the extent of one moiety or upwards" of the property, it was the duty of the Court, under sect. 4 of the Act, at their request to exercise that discretion by ordering a sale of the property (*z*).

Dissentient co-owner must redeem.

Where one of several tenants in common purported, on behalf of himself and his co-tenants, to enter into a contract for the sale of the property, which was subject to a mortgage, and the purchaser, under the belief that all the co-tenants would concur in the conveyance to him, paid off the mortgage, but one of the co-tenants refused to so concur, and the purchaser then brought an action for specific performance of the agreement; it was held that the dissentient co-tenant must, as regards his share, redeem or be foreclosed, and that in case of redemption there should be a partition (*a*).

Costs.

In an action for partition of a mortgaged estate only one set of costs can be allowed for each share, and if some shares are incumbered and some not, each owner of an incumbered share must bear the costs of his own incumbrancers (*b*).

Exchange

Where an Inclosure Act authorizes exchanges to be made with the consent of the owner or proprietor of the lands exchanged, whether tenant in fee simple, fee tail, for life, or years, and provides that all incumbrances charged on the lands given in exchange shall become charged on those taken in exchange, it appears to be undecided whether the consent of the mortgagor in possession to an exchange is sufficient without the consent of the mortgagee (*c*).

Entail of equity of redemption.

v.—Entail and Settlement of Equity of Redemption.—Prior to the decision that an equity of redemption was an estate in the land, and so long as the notion prevailed that it was but a right, the limitation of it by way of entail, or in strict settlement, seemed out of the question; and it was considered that such an entail, if it could subsist, would tend to a perpetuity. But when the equity was declared to be the ancient estate without change of ownership, it became, of course, subject to all the limitations to which other estates in equity were liable (*d*).

(*z*) *Davenport* v. *King*, 49 L. T. 92.

(*a*) *Davies* v. *Davies*, 6 Jur. N. S. 1320.

(*b*) *Catton* v. *Banks*, (1893) 2 Ch. 221; *Re Vase, Langrish* v. *Vase*, W. N. (1901) 124. But see *contrà*, *Belcher* v. *Williams*, 45 Ch. D. 510.

(*c*) *Goodtitle* v. *Milburn*, 3 M. & W. 853.

(*d*) Hard. 469.

Bar of entail.

It had been long (*e*) settled that an equitable entail and remainders were barrable by such mode of assurance only as would have barred a legal entail and remainders. By 3 & 4 Will. IV. c. 74, abolishing fines and recoveries, a power of disposition has been given to tenants in tail of freehold lands by simple deed inrolled in Chancery, and of copyholds by deed inrolled in the manor, or by actual surrender (*f*).

Contingent remainders.

Where the legal estate is outstanding in a mortgagee, the failure of the particular estate does not destroy the contingent remainders in an equity of redemption (*g*).

Tenant for life must keep down interest on mortgage.

It is a general rule, where an estate is settled subject to a mortgage, that the tenant for life of an equity of redemption shall be compelled to keep down the interest accruing during the period of his being in possession, for which purpose the reversioner or remainderman may bring an action for relief; and if the tenant for life suffer the interest to run in arrear, and die, the reversioner or remainderman may call on his personal representatives to discharge the arrears (*h*).

Administration suit.

In an administration suit, the tenant for life must keep down the interest on all debts (*i*).

Nature of obligation.

The obligation of the tenant for life to keep down the interest on incumbrances exists only as between him and the remainderman, and not as between him and the incumbrancers (*k*).

The mere laches of the incumbrancer in not enforcing payment of the interest from the tenant for life will not affect his remedy against the inheritance; but he may be precluded from recovering arrears of interest against the inheritance by collusion or other dealings with the tenant for life (*l*).

The reversioner (*m*) and the next tenant for life (*n*) may bring an action against the tenant for life to make the rents amenable, and may compel him to answer what has accrued,

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(*e*) *Kirkham* v. *Smith*, Amb. 518.

(*f*) See sects. 15, 50, 53 of this Act.

(*g*) *Astley* v. *Micklethwait*, 15 Ch. D. 59.

(*h*) *White* v. *White*, 9 Ves. 554, 560; *Shore* v. *Shore*, 4 Drew. 501; *Makings* v. *Makings*, 1 De G. F. & J. 355; *Caulfield* v. *Maguire*, 2 J. & L. 141; *Barnes* v. *Bond*, 32 Beav. 653; *Frewen* v. *Law Life Ass. Soc.*, (1896) 2 Ch. 511.

(*i*) *Allhusen* v. *Whittell*, L. R. 4 Eq. 295; *Lambert* v. *Lambert*, L. R. 16 Eq. 320; *Marshall* v. *Crowther*, 2 Ch. D. 199.

(*k*) *Re Morley*, *Morley* v. *Saunders*, L. R. 8 Eq. 596.

(*l*) *Loftus* v. *Swift*, 2 Sch. & L. 642; *Wrixon* v. *Vize*, 2 Dr. & W. 192; *Makings* v. *Makings*, 1 De G. F. & J. 358.

(*m*) *Caulfield* v. *Maguire*, 2 J. & L. 160; *Hayes* v. *Hayes*, 1 Ch. Ca. 223.

(*n*) *Revel* v. *Watkinson*, 1 Ves. Sen. 93.

and they have an equity to have the estate recouped out of the future income accruing to the tenant for life (*o*).

It was said by Lord Romilly (*p*), that if the reversioner stand by and allow the interest to fall in arrear, the reversion will be charged, and the reversioner cannot afterwards establish a debt against the assets of the tenant for life on the ground that the rents were sufficient; but this dictum has been questioned (*q*).

Power of appointment.

He is not exempt from keeping down the interest by the possession of an absolute power of appointment (*r*).

Interest exceeding rents.

If the current rents are insufficient to keep down the interest, subsequent rents arising during the life of the tenant for life are applicable to liquidate arrears accruing during the same tenancy (*s*).

Where a fund is insufficient to keep down the arrears of an annuity which become a charge on the corpus, the tenant for life is only bound to keep down the interest of the arrears (*t*).

But, if the rents are not sufficient to pay the interest which the tenant notwithstanding pays, he cannot claim the excess against the remainderman without having previously intimated to the latter his intention to charge the inheritance (*u*).

Tenant for life answerable only during possession.

The tenant for life, however, is only answerable during the period of his possession; and therefore, if there be tenant for life, with remainder over for life, under the same settlement, and the first tenant for life permit the interest to run in arrear, the second tenant for life shall not be compelled by the reversioner or remainderman out of the rents to discharge the arrears (*x*).

A careful distinction must, however, be drawn between the last-mentioned case and certain cases with which it may easily be confounded. As, for example, if an estate in mortgage be limited in strict settlement, subject to a jointure created by a prior settlement, and during the life of the jointress the surplus rents are not sufficient to keep down the interest, so that it runs

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(*o*) *Waring* v. *Coventry*, 2 My. & K. 406. But see the dictum of Lord Westbury, *contra*, in *Scholefield* v. *Lockwood*, 4 De G. J. & S. 22.

(*p*) *Lord Kensington* v. *Bouverie*, 19 Beav. 54.

(*q*) Lord Brougham in *Lord Kensington* v. *Bouverie*, 7 H. L. C. 564; *Baldwin* v. *Baldwin*, 4 Ir. Ch. 505; *S. C.*, 6 Ir. Ch. 156.

(*r*) *Whitbread* v. *Smith*, 3 De G. M. & G. 741.

(*s*) *Honywood* v. *Honywood*, (1902) 1 Ch. 347.

(*t*) *Playfair* v. *Cooper*, 17 Beav. 187.

(*u*) *Lord Kensington* v. *Bouverie*, 7 H. L. C. 557.

(*x*) See 1 Ves. Sen. 95.

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in arrear, and afterwards the jointress dies in the lifetime of the tenant for life, on which there arises a surplus rent beyond the current interest, the tenant for life must, during the continuance of his estate in the property, apply the surplus rent in reducing the arrears (*y*).

Instalments.

Where there is an instalment mortgage on settled property, and successive tenants for life pay the instalments as they become due, the several tenants for life are entitled to be recouped rateably, the first tenant for life having no priority over the others (*z*).

Liability to keep down interest where conversion postponed.

A tenant for life will not be bound to keep down the interest on a mortgage on property, his enjoyment of which is postponed, during the period of postponement. So, where the trustees of a will paid out of the income of the testator's residuary estate the premiums on a mortgaged policy of assurance on a surviving life (the realization of which by surrender they postponed for the benefit of the estate), and the interest on the mortgage; on the falling in of the life, the mortgage was paid off out of the policy moneys received by the trustees; it was held that the tenant for life was entitled to be recouped the amount of income so expended with interest at 4 per cent. out of the surplus policy moneys (*a*).

Rule as to gifts by same will of beneficial and onerous property.

It is a general rule that, where a testator makes to the same person several gifts, one of which is beneficial, and the other is onerous, the test as to whether the one gift may be taken and the other rejected, is whether or not the gifts are separate and distinct (*b*).

Gift including encumbered and unencumbered property.

This rule has been applied in several cases as determining whether a tenant for life is liable to keep down the interest on estates which are settled, subject to a mortgage, out of all property given to him by the will, or whether he is bound only to apply towards payment of the interest the income of such property as is subject to the mortgage.

Where the gift of several properties

So, where a testatrix, being at the time of her death possessed in fee of two estates, one of which was subject to a mortgage,

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(*y*) *Revel* v. *Watkinson*, 1 Ves. Sen. 93; *Honywood* v. *Honywood*, (1902) 1 Ch. 347. And see *Tracey* v. *Hereford*, 2 Bro. C. C. 28; *Sharshaw* v. *Gibbs*, Kay, 333.

(*z*) *Re Nepean's Settled Estate* (1900), 1 Ir. R. 298; *Re Gore Booth* (1910), 1 Ir. R. 139.

(*a*) *Re Morley*, *Morley* v. *Haig*, (1895) 2 Ch. 738.

(*b*) See Jarm. Wills (6th ed.), vol. i. p. 556. See also *Talbot* v. *Earl of Radnor*, 3 My. & K. 254; and *Guthrie* v. *Walrond*, 22 Ch. D. 573; *Re Loom*, (1910) 2 Ch. 230 (cases of onerous leases).

is as an undivided whole.

and the other unencumbered, devised all her real and personal estate to trustees upon trust for sale at their discretion, and to invest the proceeds, and to hold such "real and personal estate" upon trust to pay the rents and annual produce thereof to A. for life, with remainder to the use of B., "his heirs, executors, administrators, and assigns for ever, according to the nature and quality thereof respectively;" it was held that the rents of the unencumbered estate were liable for the interest on the mortgage of the encumbered estate (*c*).

Keeping down interest on several charges out of whole income.

Where several estates are included in the same settlement the tenant for life is bound to keep down the interest in respect of the charges on the several estates out of the income of the whole (*d*). Therefore he is liable as between himself and the remaindermen to make good arrears of interest accrued during his life tenancy out of subsequent rents received by him from any of the estates, even though the charge in respect of which the arrears have arisen has been paid off by means of a sale of part of the property (*e*).

Where gifts are separate and distinct.

On the other hand, where a testator devised a freehold house on trust for A. and B. for life, and, after the decease of the survivor, directed that the house should form part of his residuary estate, and he also bequeathed an annuity to A. and B., and subject thereto he devised his residuary estate upon trust for the benefit of certain persons; the rent of the house having proved insufficient to keep down the interest on the mortgage debt, it was held that A. and B. were not bound to make up the deficiency (*f*).

Annuity.

Where money is borrowed by way of a grant of a redeemable annuity out of land, the annuity must be valued, and the tenant for life under the will of the borrower, as between him and the remainderman, is only bound to pay interest on the estimated value of the annuity at the death of the grantor (*g*).

Assignee of tenant for life.

The assignee and judgment creditor of the tenant for life are subject to the same liability to keep down the interest as the tenant for life himself (*h*). Where the mortgagee (*i*) having

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(*c*) *Re Hotchkys, Freake* v. *Calmady*, 32 Ch. D. 408, C. A.; *Honywood* v. *Honywood*, (1902) 1 Ch. 347.

(*d*) *Frewen* v. *Law Life Assurance Soc.*, (1896) 2 Ch. 511.

(*e*) *Honywood* v. *Honywood*, (1902) 1 Ch. 347.

(*f*) *Syer* v. *Gladstone*, 30 Ch. D. 614; *Re Kensington, Longford* v. *K.*, (1902) 1 Ch. 203.

(*g*) *Bulwer* v. *Astley*, 1 Ph. 422; *Re Muffett*, 39 Ch. D. 534.

(*h*) *Scholefield* v. *Lockwood*, 4 De G. J. & S. 22.

(*i*) *Lord Penrhyn* v. *Hughes*, 5

permitted the tenant for life to run in arrear, purchased the life estate, the Court directed him to apply the surplus rent beyond the current interest towards liquidation of the arrears.

Husband and wife.

If the estate of the wife is subject to a mortgage, the husband and wife are not bound to keep down the interest for the benefit of the heir of the wife; and, therefore, the amount of interest actually due at the death of the wife should be added to the principal, and the husband, entitled as tenant by the curtesy, should keep down the interest of the aggregate sum during the remainder of his life. But he is not entitled to any allowance for interest actually paid by him during his wife's life (*k*).

Where the estates of the husband and wife were mortgaged to secure the husband's debt, which was paid off out of the produce of the wife's estate, the representatives of the wife were not allowed interest on the sum paid against the husband's estate (*l*); apparently because it constituted a mere simple contract debt which did not carry interest.

Tenant in tail.

A tenant in tail in possession cannot be compelled to keep down the interest on a mortgage, because the reversioner and remainderman are considered as wholly in his power (*m*). But an exception to the rule arises if the tenant in tail is an *infant*, in which case the reasoning does not apply; and it is therefore decided that the guardians or trustee of an infant tenant in tail are bound to apply the rents in keeping down the interest; and if the guardian permits the interest to run in arrear during the infancy of the tenant in tail, an account of the rents and profits will be decreed after the infant's death (*n*); and this is so though the infant has a general power of appointment (*o*). And even in the case of an infant tenant in fee, the guardian is bound to keep down the interest of incumbrances out of the rents, and not increase the infant's personal estate at the expense of the real estate (*p*). If a tenant in tail of full age keeps down the interest and dies, his personal representative will not be a creditor for the amount of interest paid, but the remainderman

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Ves. 106; and *Amesbury* v. *Brown*, 1 Ves. Sen. 477.

(*k*) *Ruscombe* v. *Hare*, 2 Bli. N. S. 192.

(*l*) *Lancaster* v. *Evors*, 10 Beav. 154, 266.

(*m*) *Amesbury* v. *Brown*, 1 Ves. Sen. 477; *Chaplin* v. *Chaplin*, 3 P. Wms. 235.

(*n*) *Sergison* v. *Sealey*, 2 Atk. 416; *Burgess* v. *Mawbey*, 1 T. & R. 167, and cases there cited; *Bertie* v. *Lord Abingdon*, 3 Mer. 566.

(*o*) *Whitbread* v. *Smith*, 3 D. M. & G. 727, 741.

(*p*) *Jennings* v. *Looks*, 2 P. Wms. 276.

or reversioner will have the benefit (*q*); and in a case in which it appeared that a man, being seised of lands in right of his wife, who was tenant in tail in possession, subject to a subsisting mortgage, took in the mortgage, and during his wife's life was himself in receipt of the rents, the Court, after the wife's death, on a bill filed by the reversioner to redeem, refused the husband interest on the mortgage during the period he had been in possession of the rents (*r*).

No escheat now for felony.

vi.—Escheat and Forfeiture.—It was long ago enacted (*s*) that no land, stock or chose in action vested in any person by way of mortgage (except as to the mortgagee's beneficial interest therein) shall escheat or be forfeited by reason of the attainder or conviction of the mortgagee. And by the Forfeiture Act, 1870 (*t*), escheat and forfeiture for treason and felony were abolished except forfeiture consequent on outlawry (*u*); and by the same Act provision is made for vesting the convict's property in an administrator to be appointed by the Crown.

By the Trustee Act, 1893 (*x*), property vested in any person by way of mortgage does not, on that person becoming a convict, vest in the administrator appointed under the Forfeiture Act, but remains in the mortgagee or descends to his representatives; but the Act does not affect any beneficial interest of the mortgagee in the property.

The legal estate, as well as the beneficial interest in mortgaged property, may, however, still escheat where the mortgagee is illegitimate and dies intestate and without issue.

Where an estate had been mortgaged for a term, and afterwards by way of equitable deposit of title deeds, beyond its value, it was held that the mortgagor was not a bare trustee under the Act for the mortgagee, so as to prevent an escheat of the legal fee to the Crown (*y*).

Forfeiture of equity of redemption.

The Crown may redeem such estates as vest in it by forfeiture (*z*).

(*q*) *Amesbury* v. *Brown*, *sup.* at p. 481.

(*r*) *Amesbury* v. *Brown*, 1 Ves. Sen. 477. And see *Ware* v. *Polhill*, 11 Ves. 278; *Ruscombe* v. *Hare*, 2 Bli. N. S. 192; *Lord Penrhyn* v. *Hughes*, 5 Ves. 99.

(*s*) 13 & 14 Vict. c. 60, ss. 46 and 47; replacing 4 & 5 Will. IV. c. 23.

(*t*) 33 & 34 Vict. c. 23.

(*u*) Outlawry in civil proceedings is abolished by 42 & 43 Vict. c. 59, s. 3.

(*x*) 56 & 57 Vict. c. 53, s. 48; replacing 13 & 14 Vict. c. 60, ss. 46, 47.

(*y*) *Rogers* v. *Maule*, 1 Y. & C. C. C. 4.

(*z*) *Att.-Gen.* v. *Crofts*, 4 Bro. P. C. 136.

An equity of redemption of a mortgage in fee was liable to forfeiture for treason, but not for felony (*a*); but the equity of redemption in the case of a term was forfeited by either treason or felony (*b*). Now, however, as we have seen, forfeiture for treason and felony has been abolished (*c*), and administrators are appointed by the Crown of the property of any convict, who may pay his debts; and the property of the convict, on completion of his sentence or on his death, reverts to him or his heirs.

Escheats of equity of redemption in realty.

Formerly, in case of death intestate and without an heir, the equitable interest of a *cestui que trust* in land, or in the proceeds of sale of land devised upon trust for sale, did not escheat to the Crown, but vested beneficially in the trustee (*d*); similarly, in such a case an equity of redemption was not liable to escheat, and, accordingly, Lord Eldon thought that the mortgagee might refuse to be redeemed by anyone (*e*). It was, however, decided in a later case that the mortgagee did not take the equity of redemption absolutely, but as assets for the payment of the debts of the mortgagor, whose legal personal representative, therefore, had a right to redeem (*f*).

Intestates Act, 1884.

But now, by the Intestates' Estates Act, 1884 (*g*), where a person has died since the 14th of August, 1884, without an heir and intestate in respect of any real estate consisting of any equitable estate or interest in land, corporeal or incorporeal, the law of escheat is to apply in the same manner as if the estate or interest were a legal estate in corporeal hereditaments.

Crown subject to debts.

When an estate is mortgaged beyond its value, but the legal estate is left in the mortgagor and escheats to the Crown, the estate may be sold in an administration suit, and a grant be applied for from the Crown (*h*), or in a suit by the mortgagee (not being a creditor's suit) he will be decreed to hold against the Crown until the mortgage debt is paid (*i*).

Prerogative of Crown as to

If a mortgagor of personalty dies intestate without any next

(*a*) *Att.-Gen.* v. *Sands*, Hard. 488; *Lovell's case*, 1 Salk. 85; *Att.-Gen.* v. *Crofts*, 4 Bro. P. C. 136. But see Sugd. Gilb. on Uses, 78, note.

(*b*) See Sugd. Gilb. on Uses, 79.

(*c*) 33 & 34 Vict. c. 23.

(*d*) *Burgess* v. *Wheate*, 1 Ed. 177. And see *Fawcet* v. *Lowther*, 2 Ves. Sen. 300, 304; *Taylor* v. *Haygarth*, 14 Sim. 8, 17; *Re Lashmar, Moody* v. *Penfold*, (1891) 1 Ch. 258, C. A.

(*e*) *Gordon* v. *Gordon*, 3 Swanst. 470.

(*f*) *Beale* v. *Symonds*, 16 Beav. 406.

(*g*) 47 & 48 Vict. c. 71.

(*h*) *Rogers* v. *Maule*, 1 Y. & C. C. C. 4.

(*i*) *Hodge* v. *Att.-Gen.*, 3 Y. & C. Ex. 342.

of kin, the Crown, by virtue of its prerogative, will stand in their place (*k*), subject, nevertheless, to the right of his widow to the amount or value of 500*l*. (*l*), which may be raised by sale or mortgage (*m*), and to a moiety of the residue of the mortgaged property, if of greater amount or value (*n*).

mortgaged personalty.

Land Transfer Act, 1897.

As regards escheated land, the Land Transfer Act, 1897, does not bind the Crown, and accordingly it does not affect the legal estate in such land (*o*).

Escheat to lord.

The lord, under the reservation of the equity of redemption to the mortgagor, his heirs, executors, administrators, and assigns, takes it by escheat, as an assign in law, as belonging to the inheritance (*p*). So the lord would, in equity, be entitled to a term of years attendant upon the inheritance as part of the escheated property (*q*), and a mortgagee of a term cannot (at least since 3 & 4 Will. IV. c. 104, under which the lord out of the lands escheated has to pay the mortgage debt (*r*)), hold the term against the lord claiming to redeem as taking the reversion by escheat (*s*).

Curtesy.

vii.—Curtesy and Dower.—In consistency with the anomalous decision of equity, that there should be a tenancy by the curtesy, but not dower, of a trust estate, the like was decided of an equity of redemption. The right to tenancy by the curtesy was at first disputed, on the notion already mentioned, that the equity was but *a right*, of which a seisin could not be had by the wife so as to give title to the husband; but Lord Hardwicke, in deciding the equity to be an estate, decided also the right to the tenancy by the curtesy (*t*).

Dower.

It was formerly regarded as settled that a widow could not claim dower out of an equity of redemption (*u*), though the contrary was held in one case (*x*). But the statute 3 & 4 Will. IV.

(*k*) *Taylor* v. *Haygarth*, 14 Sim. 8; *Powell* v. *Merrett*, 1 Sm. & G. 381. See 39 & 40 Vict. c. 18, repealing 15 & 16 Vict. c. 3.

(*l*) 53 & 54 Vict. c. 29.

(*m*) *Re Charriere*, (1896) 1 Ch. 912.

(*n*) See *Cave* v. *Roberts*, 8 Sim. 214.

(*o*) *Re Hartley*, (1899) P. 40; *Re Ball*, W. N. (1902) 226, 228.

(*p*) Co. Lit. 215 a.

(*q*) *Thruxton* v. *Att.-Gen.*, 1 Vern. 340.

(*r*) *Evans* v. *Brown*, 5 Beav. 114; *Hughes* v. *Wells*, 9 Ha. 750.

(*s*) *Viscount Downe* v. *Morris*, 3 Ha. 394. See *Rogers* v. *Maule*, 1 Y. & C. C. C. 4; *Hancock* v. *Att.-Gen.*, 12 W. R. 569.

(*t*) *Casborne* v. *Scarfe*, 1 Atk. 602; *ante*, p. 649.

(*u*) *Att.-Gen.* v. *Scott*, Cas. t. Talb. (Williams) 138, and cases in note; *D'Arcey* v. *Blake*, 2 Sch. & L. 391.

(*x*) *Banks* v. *Sutton*, 2 P. Wms. 700.

c. 105, removed this anomaly, by enacting that when a husband shall die beneficially entitled to any land for an interest, which shall not entitle his widow to dower out of the same at law, and such interest, whether equitable or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate of joint tenancy), then his widow shall be entitled in equity to dower out of the same.

The statute has, however, placed the right to dower in an equity of redemption absolutely within the disposal of the husband, who may deprive his widow of it wholly or *pro tanto* by subsequent alienation or charge, or by simple declaration of intention by deed or will.

Devolution of equity of redemption in freeholds.

viii.—Devolution, Devise, &c. of Equity of Redemption.—An equity of redemption being an estate in the land without change of ownership, it necessarily follows that its line of devolution must, in the course of descent, be governed as the land itself would have been, by the general law (*y*); or by the *lex loci*; and therefore, if the land be of gavelkind tenure, the equity of redemption will be divisible in like manner; or if the tenure be borough-English, the youngest son will be entitled. So an equity of redemption in copyholds would before the Land Transfer Act, 1897, descend to the customary heir of the mortgagor, as the legal estate would have done (*z*). It also follows that the doctrine of *possessio fratris* would formerly have applied in exclusion of the half-blood (*a*).

Devise of equity of redemption.

A devise of the equity of redemption will be valid if attended with the like formalities as the law requires for a devise of the land (*b*).

It may be here observed that, until the period for redemption has arrived, the mortgagor has a right of entry only, but such a right is now devisable at law (*c*). Even before the Wills Act a devise made by the mortgagor would have been good in equity, whether the mortgagor died before or after the breach of the condition.

(*y*) *Duly* v. *Nalder*, 11 Jur. N. S. 921.

(*z*) *Fawcet* v. *Lowther*, 2 Ves. Sen. 300, 304. See *Blake* v. *Foster*, 2 Ba. & Be. 387, 402.

(*a*) But see 3 & 4 Will. IV. c. 106, s. 9.

(*b*) *Phillips* v. *Hele*, 1 Rep. in Ch. 190.

(*c*) 1 Vict. c. 26, s. 3.

Revocation of will by mortgage under old law.

Before the Wills Act, which makes wills speak from the death, a will was only revoked *pro tanto* by a subsequent mortgage of the devised land, if such mortgage was confined to the purposes of the security (*d*); but a mortgage by a disentailing deed, which limited the equity of redemption to the mortgagor in fee, was a total revocation of a prior will (*e*).

Devolution of equity of redemption in copyholds.

As the mortgagor of copyhold lands remains tenant to the lord until the admittance of the mortgagee, the copyholds will on his death descend to his customary heir, though the lord has accepted rent from the surrenderee (*f*), and a heriot will become due (*g*), and the mortgagor remains liable to the lord for services, and for the purpose of forfeiture (*h*).

Devise.

A surrenderee, not being tenant until admittance, cannot in the meantime pass the lands by surrender (*i*), although he may make an equitable transfer of them. He may also devise the lands, and, in the case of a will made before the 1st of January, 1838, they would have passed in equity (*k*), but the devisee was not entitled to admission as legal tenant, for a legal devise of copyholds could not be made before admittance (*i*); and, therefore, although the devisee was admitted, the surrenderor or his heir still remained tenant to the lord. But equity considered the legal tenant to be a trustee for the devisee. The proper course to be pursued, probably, was for the heir of the surrenderor to be admitted and to make a surrender to the devisee.

Devolution, &c. of mortgaged personalty.

The principle that a mortgage of property does not affect the devolution or testamentary disposition of the mortgaged property applies to personalty no less than realty; and, accordingly, an equity of redemption in personalty vests, on the death of the mortgagor, in his personal representatives, to be applied by them in due course of administration.

Land Transfer Act, 1897.

The same rule now applies to an equity of redemption in freeholds which is vested in any person without a right in any other person to take by survivorship, and accordingly such equity will, notwithstanding any testamentary disposition, devolve to

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(*d*) *Perkins* v. *Walker*, 1 Vern. 97; *Hall* v. *Dench*, 1 Vern. 392; *Brain* v. *Brain*, 6 Madd. 221. See *Youde* v. *Jones*, 13 M. & W. 534.

(*e*) *Power* v. *Power*, 9 Ir. Ch. R. 178; *Sparrow* v. *Hardcastle*, 3 Atk. 798; *Harmood* v. *Oglander*, 8 Ves. 107; *Locke* v. *Foote*, 5 Sim. 618.

(*f*) *Frosel* v. *Welsh*, Cro. Jac. 403.

(*g*) Watk. Cop. (4th ed.) p. 104; 2 Pow. Mtg. (6th ed.) p. 1071.

(*h*) *Doe* v. *Wroot*, 5 East, 132; *Reg.* v. *Mildmay*, 5 B. & Ad. 254. See *Minton* v. *Kirwood*, L. R. 1 Eq. 449, affirmed L. R. 3 Ch. 615.

(*i*) *Doe* v. *Tofield*, 11 East, 246.

(*k*) *Davie* v. *Beversham*, 3 Rep. in Ch. 2.

the personal representatives of the mortgagor with all the rights and liabilities they would have with regard to a chattel real (*l*). The same rule would also seem to apply to an equity of redemption in copyholds where the mortgagor has not been admitted (*m*).

Liability of equity of redemption to mortgagor's debts.

ix.—Liability of Equity of Redemption to Mortgagor's Debts.—An equity of redemption, being an estate of the mortgagor, is liable in his hands to satisfy the claims of creditors, and they may enforce their claims by entering up judgment, and proceeding thereunder against the property subject to the mortgage.

Judgments under 1 & 2 Vict. c. 110.

By sect. 11 of the statute 1 & 2 Vict. c. 110, the sheriff is empowered to deliver in execution to judgment creditors all lands, &c. of their debtors; and by sect. 13 of the same Act, a charge upon the real estate of a judgment debtor was created to take effect in favour of a creditor who had entered up his judgment.

23 & 24 Vict. c. 38.

In 1860, by 23 & 24 Vict. c. 38 (*n*), an alteration was effected in respect of judgments, statutes, or recognizances entered up after the 23rd July, 1860, and no mortgagee was affected thereby, unless the writ of execution thereon had been issued and registered under the above statute, and also executed within three calendar months from such registry.

27 & 28 Vict. c. 112.

In 1864 a further alteration was made in the law, and a judgment creditor had no lien, until the land had been actually delivered in execution. By 27 & 28 Vict. c. 112, s. 1 (*o*), no judgment, statute, or recognizance entered up after the 29th July, 1864, shall affect land of any tenure, until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or *other lawful authority* in pursuance of such judgment.

63 & 64 Vict. c. 26.

By the Land Charges Act, 1900 (*p*), which extends the operation of the Land Charges Act, 1888, a judgment, whether obtained on behalf of the Crown or otherwise, does not operate as a charge on land or on any interest in land, until a writ or order for the purpose of enforcing it is registered under the Land Charges Act, 1888.

(*l*) 60 & 61 Vict. c. 65, s. 1; *Re Harrowby and Paine*, W. N. (1902) 137.

(*m*) *Re Somerville and Turner*, (1903) 2 Ch. 583.

(*n*) Repealed by Land Charges Act, 1900.

(*o*) *Ibid.*

(*p*) 63 & 64 Vict. c. 26, s. 2, set out *post*, Chap. LIX., Sect. I. (ii).

Equity of redemption extendible at suit of Crown;

Under an extent at the suit of the Crown, an equity of redemption (*q*), or any other equitable interest in lands except copyholds, to which the debtor is beneficially entitled (*r*), can be actually taken and delivered in execution, and may be sold to satisfy the Crown debt (*s*).

On an application for an order for sale of a Crown debtor's equity of redemption in lands, under the statute 25 Geo. III. c. 35, notice must be given to the mortgagee of the intended motion for an order to sell the estate subject to the mortgage, and under this order the sheriff ought to sell the equity of redemption only. And where the whole estate was sold without reference to the mortgage, the Court refused to order payment of the mortgage out of the proceeds of the sale, without the consent of the mortgagor; but directed a reference to ascertain what was due on the mortgage (*t*).

—not at suit of subject.

An equity of redemption, whether in a freehold estate (*u*) or a term (*x*), cannot be extended by the sheriff at the suit of a subject: and, accordingly, a creditor cannot, by entering up judgment and suing out a writ of *elegit*, obtain a charge, by virtue of sect. 11 of the statute 1 & 2 Vict. c. 110, upon lands in mortgage.

Equitable execution.

In such a case, however, the creditor can obtain equitable execution which will give him a charge under sect. 13 of that Act, provided he registers the order (*y*).

For this purpose, the aid of equity may be invoked by writ of assistance, sequestration, or the appointment of a receiver.

Writ of assistance.

Writs of assistance have in great measure been superseded by writs of possession, though the Court has still power to grant, and has under special circumstances recently granted, such writs in aid of judgments for the recovery of land or delivery of chattels (*z*).

Nature and effect of sequestration.

Sequestration is a prerogative process addressed to Commissioners, empowering them to enter upon real estates and sequester

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(*q*) *R.* v. *Coombes*, 1 Pri. 207; *Fenton* v. *Philpot*, 12 Pri. 197.

(*r*) *Att.-Gen.* v. *Sands*, Hard. 495; *Devonshire's case*, 11 Rep. 92. See 13 Eliz. c. 4, s. 5.

(*s*) *R.* v. *De La Motte*, 2 H. & N. 589; Forr. 162. See 13 Eliz. c. 4; 25 Geo. III. c. 35; 28 & 29 Vict. c. 104, s. 50.

(*t*) *R.* v. *Coombes*, 1 Pri. 207.

(*u*) *Thornton* v. *Finch*, 4 Giff. 515; *Halton* v. *Haywood*, L. R. 9 Ch. 229; *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, C. A.

(*x*) *Salt* v. *Cooper*, 16 Ch. D. 544. See *Burdon* v. *Kennedy*, 3 Atk. 738.

(*y*) 63 & 64 Vict. c. 26.

(*z*) See *Hall* v. *Hall*, 47 L. J. Ch. 680; *Wyman* v. *Knight*, 39 Ch. D. 165.

the rents, and upon the personal estate and effects of a person in contempt for disobedience of a decree or order, and to keep the same until the defendant clear his contempt (*a*). It does not, however, create a charge upon the sequestered property (*b*).

Appointment of receiver.

Equitable execution of an equity of redemption or other interests in land not extendible, is usually effected by means of an appointment by the Court of a receiver of the rents and profits of the lands (*c*). A judgment creditor may, without commencing a fresh action or suit, make an interlocutory application by motion or summons, in the action in which he has recovered judgment, for the appointment of a receiver (*d*), but the application should not be *ex parte* (*e*).

Omission of receiver to give security.

In a case where the giving security by the receiver was part of the order appointing him, and, therefore, the order was not complete without security being given (*f*), yet the omission to give such security was held not to prevent the order from operating as a delivery of the land in execution (*g*).

Equity of redemption in chattels.

An equity of redemption in chattels cannot be seized and sold by the sheriff. If goods are taken in execution, and it appears that they have been previously assigned by way of bill of sale, it is the duty of the sheriff to withdraw and return *nulla bona*, as the property in the goods has already passed by the bill of sale (*h*). But in such a case the Court has power to order a sale of the goods (*i*). A sale, however, will not, it seems, be ordered unless there will be a surplus (*k*).

Satisfaction of debt out of rents and profits, or by sale.

Where a judgment creditor has obtained equitable execution by means of a receivership order or otherwise, and has registered the order, he may, subject to the rights of prior incumbrancers, satisfy his debt out of the rents and profits, or he may, by virtue of the charge created by sect. 13 of the stat. 1 & 2 Vict. c. 110, proceed to a sale of the lands for the satisfaction of his debt, under sect. 4 of the stat. 27 & 28 Vict. c. 112.

(*a*) Wharton, Law Lex. s. v. "Sequestration." See also R. S. C., Ord. XLIII. r. 6.

(*b*) *Re Pollard*, (1903) 2 K. B. 41, C. A.

(*c*) *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, 291, C. A.

(*d*) *Smith* v. *Cowell*, 6 Q. B. D. 75, C. A.; *Westhead* v. *Riley*, 25 Ch. D. 414.

(*e*) *Re Potts, Exp. Taylor*, (1893) 1 Q. B. 648.

(*f*) *Edwards* v. *Edwards*, 2 Ch. D. 291, C. A.

(*g*) *Exp. Evans, Re Watkins*, 13 Ch. D. 252, C. A.

(*h*) *Scarlett* v. *Hanson*, 12 Q. B. D. 213, C. A.

(*i*) R. S. C., Ord. LVII. r. 12, substituted for sect. 13 of the Common Law Procedure Act, 1860. But see Bankruptcy Act, 1890, s. 11; *Stern* v. *Tegner*, (1898) 1 Q. B. 37.

(*k*) *Stern* v. *Tegner*, *sup.*

Equity of redemption vests in trustee of bankrupt mortgagor.

On the bankruptcy of a mortgagor the equity of redemption in the mortgaged property passes to the official receiver until the appointment of a trustee, and then to the trustee, whether the property be valuable or not (*l*).

The trustee may make a valid release of the equity of redemption to the mortgagee (*m*), and may without disclaimer assign the legal estate to an equitable mortgagee of a lease on terms of being indemnified against liability (*n*).

Power of attorney.

A power of attorney by a mortgagor to his agent is at an end on his bankruptcy; the receipt of the agent afterwards is not as agent for the trustee, and the annulment of the bankruptcy does not vest in the bankrupt any right to recover such rents (*o*).

Disclaimer of onerous property.

By sect. 55 of the Bankruptcy Act, 1883 (*p*), the trustee is empowered to disclaim property of the bankrupt consisting of land burdened with onerous covenants, or of shares, or stock in companies, unprofitable contracts, and other unsaleable property; such disclaimer is, however, only effectual for the purpose of releasing the bankrupt and his trustee, and does not affect the rights of a mortgagee as against the property (*q*).

The section applies to a tenancy created under an attornment clause in a mortgage deed (*r*); but it does not apply to an equity of redemption in a lease, the entire residue of which has been assigned over, by way of mortgage (*s*).

Vesting order.

Under the Bankruptcy Act, 1869, which contained a similar power of disclaimer, it was decided, where the owner of freeholds burdened with onerous covenants, the title deeds of which he had deposited by way of equitable mortgage, became bankrupt, and the trustee disclaimed, and subsequently the trustee and the bankrupt purported to convey the property to the mortgagee, that the conveyance was inoperative, and that the legal estate was outstanding, and could not be got in under the Trustee Act, 1850, it having apparently, on the disclaimer, become vested in the Crown (*t*). Now, however, the Court has power,

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(*l*) *Desborough* v. *Harris*, 5 De G. M. & G. 439.

(*m*) *Melbourne Banking Corp.* v. *Brougham*, 4 App. Ca. 156.

(*n*) *Exp. Buxton, Re Muller*, 15 Ch. D. 289.

(*o*) *Markwick* v. *Hardingham*, 15 Ch. D. 339, C. A.

(*p*) 46 & 47 Vict. c. 52; 53 & 54 Vict. c. 71, s. 13.

(*q*) *Ante*, p. 169.

(*r*) *Exp. Isherwood, Re Knight*, 22 Ch. D. 354.

(*s*) *Exp. Official Receiver, Re Gee*, 24 Q. B. D. 65.

(*t*) *Re Mercer and Moore*, 14 Ch. D. 287.

under sect. 55 (6) of the Act of 1883, by order, to vest the disclaimed property in the mortgagee or his assign (*u*).

Liability of equity of redemption for debts of deceased mortgagor.

An equity of redemption is assets applicable for payment of the debts of a deceased mortgagor (*x*).

Legal and equitable assets.

Formerly the distinction between legal and equitable assets was of considerable importance, the distinction being that in the administration of assets, legal assets were distributed in a definite order of priority, while equitable assets were distributed *pari passu*. But the importance of the distinction has been greatly diminished, if not entirely destroyed, by recent legislation, and the reader is referred to former editions of this work for the old law on the subject.

(*u*) *Exp. Clothworkers' Co.*, 20 Q. B. D. 343; *Exp. Hepburn*, 25 Q. B. D. 536.

(*x*) See generally as to the application of assets to the satisfaction of claims on the estate of a deceased person, Williams on Executors, pt. iv. bk. i.

CHAPTER XXXVI.

RELATION OF THE MORTGAGOR TO THE MORTGAGEE.

Mortgagor estopped from disputing mortgagee's title.

i.—**Generally.**—The mortgagor cannot dispute his mortgagee's title against his own solemn act (*a*), and it makes no difference though the mortgagor be a trustee acting in a public capacity and not for his own benefit (*b*); nor could he, during the existence of fines and recoveries, have barred the mortgagee's title by such mode of assurance (*c*). Nor can a purchaser of the equity of redemption from the mortgagor (*d*), or a party who, though a lessee, in fact defends the action for the benefit of the mortgagor (*e*), set up a legal title in the third person paramount to that of the mortgagor (*d*), or set up a prior legal mortgage from the mortgagor to a third person (*e*), in order to defend his own possession. But the rule does not apply when a subsequent purchaser or mortgagee for valuable consideration, without notice of the prior mortgage, obtains a valid legal conveyance from the mortgagor (who has in the meantime become clothed with the legal estate), or gets in an outstanding legal estate (*f*); though it would seem that such party might be bound by estoppel, if there was a positive recital of the legal seisin of the mortgagor contained in the mortgage deed (*g*); but not if the recital was that he was legally or equitably seised (*h*). So a receipt or statement that the consideration has been paid, in a mortgage deed or transfer, may estop the mortgagor or transferor from claiming as against a person dealing in good faith

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(*a*) *Goodtitle* v. *Bailey*, Cowp. 601; *Doe* v. *Vickers*, 4 A. & E. 782; *Doe* v. *Clifton*, 4 A. & E. 813; *King* v. *Smith*, (1900) 2 Ch. 425.

(*b*) *Doe* v. *Horne*, 3 Q. B. 757; notwithstanding *Fairtitle* v. *Gilbert*, 2 T. R. 171.

(*c*) 1 Vent. 55, 80; *Pomfret* v. *Windsor*, 2 Ves. Sen. 472, 482; *Hall* v. *Doe*, 5 B. & Ald. 687.

(*d*) *Doe* v. *Stone*, 3 C. B. 176.

(*e*) *Doe* v. *Clifton*, 4 A. & E. 813.

(*f*) *Right* v. *Bucknell*, 2 B. & Ad. 278. See *Goodtitle* v. *Morgan*, 1 T. R. 755; *Lloyd* v. *Lloyd*, 4 Dr. & War. 354; *Keate* v. *Phillips*, 18 Ch. D. 560.

(*g*) *Right* v. *Bucknell*, *sup.*; *Onward Bldg. Soc.* v. *Smithson*, (1893) 1 Ch. 1, C. A. See *General Finance, &c. Co.* v. *Liberator, &c. Soc.*, 10 Ch. D. 15, 22.

(*h*) *Right* v. *Bucknell*, *sup.*; *Heath* v. *Crealock*, L. R. 10 Ch. 22, 28; *Hungerford* v. *Becher*, 5 Ir. Ch. R. 417, 426.

and for value (*i*). There is an estoppel from the word "demise" (*k*), but none from the word "grant" (*l*). The whole deed must be looked at in order to decide whether there is an estoppel (*m*).

Question of construction.

But a mortgagor may take out an originating summons under R. C. S., Ord. LIVA. r. 1, to have a question of construction arising under the mortgage deed decided, without offering to redeem (*n*).

Relation of mortgagor in possession to mortgagee.

There is some obscurity in the books as to the position in which the mortgagor, during the period of actual possession, or receipt of the rents of the land, stands in respect to the mortgagee. The result of the cases, however, appears to be, that he may be considered as tenant for a term, or at will, or by sufferance, according to circumstances; and that if he let in tenants they may, apart from the Conveyancing Act, be treated by the mortgagee as *tort-feasors*, or they may, by agreement with the mortgagee, become his tenants under a new tenancy (*o*).

Proviso for quiet enjoyment by mortgagor till default.

ii.—When the Mortgagor is Tenant for a Term.—Formerly it was the actual practice to insert in mortgage deeds a proviso that it should be lawful for the mortgagor to have quiet enjoyment of the property, until default should be made in payment on the day fixed by the mortgage deed. The effect of such a proviso was that the mortgage deed operated as a re-demise by the mortgagee to the mortgagor for the term allowed for payment of the money (*p*). As this term is now generally six months from the date of the mortgage deed, and the operation of the proviso would then cease, there is little or no practical advantage in inserting such a proviso, and it is now, in practice, usually omitted.

(*i*) *King* v. *Smith*, (1900) 2 Ch. 425; *Rimmer* v. *Webster*, (1902) 2 Ch. 163; cf. *Jared* v. *Clements*, (1903) 1 Ch. 428.

(*k*) *Sturgeon* v. *Wingfield*, 15 M. & W. 224.

(*l*) *Heath* v. *Crealock*, L. R. 10 Ch. 22.

(*m*) *Crofts* v. *Middleton*, 2 K. & J. 194.

(*n*) *Nobbs* v. *Law Reversionary Interest Soc.*, (1896) 2 Ch. 830.

(*o*) See 1 Sm. L. C. (11th ed.) pp. 542—544.

(*p*) *Wilkinson* v. *Hall*, 3 Bing. N. S. 508; *Powseley* v. *Blackman*, Cro. Jac. 659. In a note to the case of *Doe* v. *Maisey*, 8 B. & Cr. 767, it is considered that the case of *Powseley* v. *Blackman* does not bear out the above proposition. But, on perusing the case, it will be seen it was admitted that, if the proviso *had been* in the form in the text, it would have amounted to a demise for a term. In the note it is ingeniously suggested that a mortgagor may be considered as tenant in fee determinable, as in the case of a shifting use under a marriage settlement; but this would be repugnant to the use already limited to the mortgagee in fee.

Default where no certain day of payment.

But where the proviso is merely that the mortgagee may enter and take possession on default in payment on the given day, or that the mortgagee shall not take the profits until default in payment, or, as it seems, that the mortgagor shall take the profits until default in payment (no definite time being in such last-mentioned case fixed for payment of the mortgage money), in any of these cases the proviso only amounts to a covenant, and the mortgagee may bring an action for the land at any time without notice, though by the proviso he be required to give notice before entry, or though there be a covenant for further assurance by the mortgagor in case of default in payment (*q*). The action can be brought, although a bill of exchange has been given for the debt (*r*). In the earlier case of *Doe* v. *Goldwin* (*s*), where one of the trusts of a deed to secure an annuity was to permit the mortgagor to receive the rents until default in payment of the annuity, the Court of Queen's Bench held, upon the authority of *Wilkinson* v. *Hall* (*t*), that the trusts amounted to a re-demise, and that notice to quit, given by the mortgagor to a tenant of the premises, was valid against a notice by the mortgagee to pay rent. But, in his judgment in *Doe* v. *Day* (*u*), Lord Denman said: "It may be questioned whether sufficient attention was paid in that case to the point as to the certainty of time." The case can, therefore, hardly be considered as an authority.

Effect of proviso in case of mortgage of chattels.

In like manner, in a mortgage of chattels personal, a proviso that the mortgagor shall hold till default, and then that the mortgagee may take possession, was held, in the Queen's Bench, not to prevent the immediate operation of the assignment, so as to vest the property in the goods in the assignee, though the clause authorized the mortgagor to make use of articles consumable, which was held to amount only to a licence to consume (*x*). But the mortgagee of chattels and leaseholds cannot, until he has a right of *possession* of the former, or until entry on the

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(*q*) *Doe* v. *Day*, 2 Q. B. 147; *Doe* v. *Lightfoot*, 8 M. & W. 553; Bac. Abr. tit. Leases, (K.); Shep. Touchst. by Preston, 272; *Rogers* v. *Grazebrook*, 8 Q. B. 895; *Metropolitan Counties Soc.* v. *Brown*, 1 E. & E. 832; *Doe* v. *Kensington*, 8 Q. B. 429; *Trent* v. *Hunt*, 9 Exch. 14; *Doe* v. *Barton*, 11 A. & E. 307; *Doe* v. *Giles*, 5 Bing. 421; *Doe* v. *Mayo*, 7 L. J. K. B. 84; *Jolly* v. *Arbuthnot*, 4 De G. & J. 224.

(*r*) *Bramwell* v. *Eglinton*, 5 B. & S. 39.

(*s*) 2 Q. B. 143.

(*t*) 3 Bing. N. S. 508.

(*u*) 2 Q. B. 147.

(*x*) *Gale* v. *Burnell*, 7 Q. B. 150; and the judgment in *Doe* v. *Day*, 2 Q. B. 147.

latter, maintain an action of trespass against a third person (*y*), nor until he has a right of possession to the chattels can he sue in trover (*z*).

Damages for breach of proviso.

The damage recoverable by the mortgagor for breach of such proviso is not the value of the chattels, but his interest in them (*a*).

Vesting of property.

The property, notwithstanding the proviso for quiet enjoyment, vests in the mortgagee (*b*).

Mortgage for term of years.

If the mortgage is for a term of years, with a proviso that the mortgagor shall continue in quiet enjoyment until the end of the term, or until default shall be made in payment of interest, or in the performance of some other obligation under the security, it would seem that the mortgagor will be tenant of the mortgagee for the term defeasible on default (*c*).

Covenant not to call in money operating as re-demise.

So, where the plaintiff on the 5th of December, 1833, mortgaged in fee with a proviso for redemption on payment of the principal and interest on the 5th of June, 1834, but the mortgagee covenanted not to call in the principal until the 5th of December, 1840, if the interest in the meantime was duly paid, and it was agreed that the mortgagor should quietly enjoy the premises until default: it was held that this agreement amounted to a re-demise to him until the 5th of December, 1840 (*d*).

Form of proviso.

The form of the proviso is immaterial, if the intention is clear. "Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose" (*e*).

Omission to take possession.

But the mere omission to take possession is not evidence of such an agreement; and where there is nothing more than such omission, the mortgagor holds possession merely on sufferance (*f*).

(*y*) *Wheeler* v. *Montefiore*, 2 Q. B. 133.

(*z*) *Bradley* v. *Copley*, 1 C. B. 685.

(*a*) *Fenn* v. *Bittlestone*, 7 Exch. 752; *Brierley* v. *Kendall*, 17 Q. B. 937.

(*b*) *White* v. *Morris*, 16 Jur. 500, C. P.

(*c*) *Powseley* v. *Blackman*, Cro. Jac. 659.

(*d*) *Wilkinson* v. *Hall*, 3 Bing. N. C. 508.

(*e*) Bac. Ab. tit. Leases (K.).

(*f*) *Jayson* v. *Rush*, 1 Salk. 209; *Turner* v. *Meymott*, 7 Moo. 574.

Negative covenants not sufficient.

A re-demise is not created by a covenant on the part of the mortgagee not to take the profits until the day for payment of the money, or by a covenant that a mortgagee may enter *after* default: it is no good lease—only a covenant—for the words are negative only and not affirmative (*g*). To create a re-demise there must be a certain time fixed during which the mortgagor is to hold, and an affirmative covenant (*h*).

Effect where there is no proviso for quiet enjoyment.

iii.—When the Mortgagor is Tenant at Will.—If no proviso for quiet enjoyment by the mortgagor is inserted in the mortgage deed, it has been said that he will be deemed to be tenant at will of the mortgagee, who, in the absence of such proviso, may enter into possession immediately upon the execution of the mortgage deed (*i*). A tenant at will is one who, *ab initio*, enjoys the land by the express or implied consent of the owner without there being any obligation on the part of either of the parties to continue the tenancy for any certain time (*k*). But, in some respects, a mortgagor under these circumstances is in a worse position than an ordinary tenant at will, inasmuch as the mortgagee may evict him without notice or demand of possession, and might until recently retain the emblements (*l*).

Cases on question whether mortgagor is tenant of mortgagee considered.

In *Doe* d. *Roby* v. *Maisey* (*m*), Lord Tenterden is reported to have said that a mortgagor in possession was not in the situation of tenant at all; or, at all events, he was not more than tenant at sufferance, and that in a particular character, liable to be treated as tenant or trespasser, at the option of the mortgagee. But in a prior case (*n*), the Court of King's Bench appeared clear in opinion that the mortgagor might be considered as tenant in the strictest definition of that word, for the purpose of enabling the mortgagee to maintain an action for trespass against a third person; this was followed in a later case, where the mortgagee was allowed to declare "in case" as reversioner for injury to the premises, by removal of fixtures by the mortgagor's assignees (*o*).

(*g*) Shep. Touchst. by Preston, 272; *Doe* v. *Lightfoot*, 8 M. & W. 553; *Rogers* v. *Grazebrook*, 8 Q. B. 895; *Powseley* v. *Blackman*, Cro. Jac. 659; *Gale* v. *Burnell*, 7 Q. B. 850.

(*h*) *Doe* v. *Goldwin*, 2 Q. B. 143; *Doe* v. *Day*, 2 Q. B. 147, explaining *Wheeler* v. *Montefiore*, 2 Q. B. 133; 1 Sm. L. C. (11th ed.) p. 531; 2 Dav. Conv. (4th ed.) vol. ii. pt. 2, pp. 314, 315.

(*i*) *Keech* v. *Hall*, Doug. 21; *Doe* v. *Pullen*, 3 Sc. 271.

(*k*) Co. Litt. 270 b.

(*l*) Per Buller, J., in *Birch* v. *Wright*, 1 T. R. 378, at p. 383.

(*m*) 8 B. & Cr. 767.

(*n*) *Partridge* v. *Bere*, 5 B. & Ald. 604.

(*o*) *Hitchman* v. *Walton*, 4 M. & W. 409.

Chap. XXXVI. (iii.)

In *Moss* v. *Gallimore* (*p*), in which the estate was in the hands of tenants, the mortgagor was considered as a *receiver* for the mortgagee; but Lord Eldon (*q*) expressed his surprise at this doctrine, and said it was a misapplication of the principles of equity. In the earlier case of *Birch* v. *Wright* (*r*), Mr. Justice Buller considered it sufficient to designate the parties as mortgagor and mortgagee, without having recourse to any other description; and he considered that a mortgagor was neither a tenant at will nor receiver, nor was it necessary he should be so, for a mortgagor and mortgagee were characters as well known, and their rights, powers, and interests as well settled, as any in the law. But this view of the question does not meet the difficulty, for the rights, powers, and interests of mortgagor and mortgagee are in many instances grounded on their respective estates in the land; and therefore we are still driven back to the original question, what are those estates? The common law recognizes no such *estate* as that of mortgagor or mortgagee independently of some other known estate or interest in the land; for the *estates* of both mortgagor and mortgagee are of a compound nature, partaking partly of legal and partly of equitable rights; and it is difficult to perceive in what manner these compound estates can, as such, be regarded in a court of law, although the possession of the mortgagor may, as noticed in the next chapter, confer on him certain privileges under the statute law and poor laws. In addition to this it may, under some circumstances, become essential to ascertain whether at common law there is any, and what, privity of estate between the parties; for if the mortgagor in possession may be considered as tenant at will, or under the agreement for possession, as tenant for years, to the mortgagee, there will be sufficient privity of estate between them to admit of an enlargement by release alone, which will not be the case if he is to be considered as tenant at sufferance, or as agent or receiver. So long as the mortgagor is in possession of the land, and the legal ownership is in the mortgagee, there must subsist a tenancy of some sort between the parties (*s*); otherwise the mortgagor must be a trespasser, for the law of England recognizes no possession independent of

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(*p*) Doug. 283.

(*q*) See *Exp. Wilson*, 2 V. & B. 252.

(*r*) 1 T. R. 383.

(*s*) *Partridge* v. *Bere*, 5 B. & Ald. 604. See Lord Tenterden, in *Doe* v. *Maisey*, 8 B. & Cr. 767; 3 Man. & Ry. 109.

a tenancy, either to the lord paramount or a mesne lord. The mortgagor in possession must hold of someone, and to say that his possession is that of a mortgagor is in fact leaving the question undecided. At all events, the possession of the mortgagor is not adverse to the mortgagee (*t*).

Definition of mortgagor's relation to mortgagee difficult.

But in *Doe* v. *Giles* (*u*), it seems to have been considered that a mortgagor in possession is not a tenant at will. And in *Doe* v. *Barton* (*x*), Lord Denman observed, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words; but thus much is established by the cases of *Partridge* v. *Bere* and *Hitchman* v. *Walton*, that the mortgagee may treat the mortgagor as being rightfully in possession, and himself as reversioner; so that, as long as he be not treated as a trespasser, his possession is not hostile to nor inconsistent with the mortgagee's right" (*y*). In the same case Patteson, J., observed, "It is very difficult to say what the mortgagor's estate is" (*z*). And in another case the same judge said, "One is much at a loss as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee" (*a*).

The possession of the mortgagor, whether it be regarded as at the will or by the sufferance of the mortgagee, may be determined at the pleasure of the mortgagee (*b*). However great may be the rights with which in comparatively modern times the court of equity and legislation have clothed him, the mortgagor has neither legal title nor more than this precarious kind of possessory enjoyment (*c*).

Mortgagor not tenant of mortgagee without agreement.

And upon this ground, that the mortgagor in possession is not tenant to the mortgagee without an agreement to that effect, and as such possession is consequently no estate in law, it will not support the grant of a rentcharge (*d*); and in a case of a covenant to surrender copyholds by way of mortgage, with grant of a power of distress to secure the interest, it was held that if the grant of the power of distress operated, as it probably did,

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(*t*) *Doe* v. *Williams*, 5 A. & E. 291.

(*u*) 5 Bing. 421.

(*x*) 11 A. & E. 314.

(*y*) *Hitchman* v. *Walton*, 4 M. & W. 409.

(*z*) 11 A. & E. 311.

(*a*) *Doe* v. *Williams*, 5 A. & E. 297.

(*b*) *Heath* v. *Pugh*, 6 Q. B. D. at p. 359.

(*c*) *Copestake* v. *Hoper*, (1908) 2 Ch. 10, per Kennedy, L.J.

(*d*) *Freeman* v. *Edwards*, 17 L. J. Ex. 258.

as the grant of a rentcharge, the rentcharge was extinguished by the admission of the mortgagee, although the mortgagor remained in possession (*d*). But a grant of a power of distress by the mortgagor to the mortgagee, to secure the payment of interest, although it cannot operate as a rentcharge, from the time that the legal estate becomes vested in the mortgagee, may operate as a personal covenant that the mortgagee may seize such goods of the mortgagor as may be on the premises at the time the distress is made, and treat them as if distrained; and hence, there being no lien created on the specific goods, they would pass to the trustee in bankruptcy of the mortgagor (*e*). It would also seem, from another case, that a mortgagor in possession has not such an interest as can be taken under an *elegit*, so as to enable the creditor to eject a tenant, though the tenancy was created by the mortgagor subsequently to the mortgage and to the judgment. In the case referred to, it was held that under such circumstances the tenant could not, in answer to an action of covenant by his lessor (the mortgagor), plead eviction by the *elegit* creditor, as the plea at the same time disclosed the mortgage on the face of it, and therefore the want of the right of possession in the *elegit* creditor (*f*).

Tenancy at will created by express agreement.

An agreement in the mortgage deed that the mortgagor shall be tenant at will to the mortgagee, creates a strict tenancy at will, though an annual rent be reserved (*g*). And the relation of landlord and tenant may be created between them by a clause to that effect, although the mortgagor alone executes the deed (*h*); and the subsequent occupation of the premises by the mortgagor will be held to be under the tenancy, though the receipts given for the half-yearly payments of the rent are given in the name of interest (*i*).

Such a stipulation must, however, be clear and consistent with the principal object of the deed, or it will be rejected; so, where a mortgage deed provided that the mortgagors should retain possession and receive the rents and profits till default, with a stipulation that the mortgagors should become tenants at will "henceforth," the stipulation was rejected as incon-

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(*d*) *Freeman* v. *Edwards*, 17 L. J. Ex. 258.

(*e*) *Freeman* v. *Edwards*, 17 L. J. Ex. 258; *Doe* v. *Goodier*, 10 Q. B. 957.

(*f*) *Mayor of Poole* v. *Whitt*, 15 M. & W. 571. And see *Pargeter* v. *Harris*, 7 Q. B. 708.

(*g*) *Doe* v. *Cox*, 11 Q. B. 122.

(*h*) *Morton* v. *Woods*, L. R. 4 Q. B. 294.

(*i*) *West* v. *Fritche*, 3 Exch. 216.

sistent on the ground that it would have rendered the mortgagors liable to a distress for rent before default (*k*).

A covenant for quiet enjoyment as tenant at will at a yearly rent is still only a tenancy at will, although there is a proviso that no possession shall be taken till the expiration of twelve months after notice of such intention, as no certain term is thereby created (*l*).

So an agreement to become tenant at the wish and pleasure of the mortgagee, at a rent payable on certain days of the year, is but a tenancy at will (*m*); and although the tenancy be nominally created for a term of years, the same effect of a tenancy at will is created by a power to enter at any time without notice (*n*).

Receipt of interest does not create tenancy.

It was decided that the mere receipt of interest from the mortgagor, or a distress for interest under a power contained in the mortgage deed, is not a recognition by the mortgagee that the mortgagor or his tenant was at that time in lawful possession (*o*).

But this must be distinguished from the case of rent *eo nomine*, demanded and received, or distrained for, by the agent of the mortgagee, from the tenant of the mortgagor, in payment of interest, which would prevent the tenant from being treated as a trespasser (*p*).

Mortgagee not trustee for mortgagor.

Although the mortgagor is equitable owner of the property, the mortgagee cannot be considered as a trustee for the mortgagor (*q*), even though the mortgage is in the form of a trust for sale (*r*); for a trustee is not allowed to deprive his *cestui que trust* of his possession, but a mortgagee may assume the possession whenever he pleases (*s*); if there is no agreement to the contrary, equity never interferes to prevent the mortgagee from assuming the possession, but for such purposes will consider the mortgagor a mere tenant at will (*t*).

Determination of tenancy at will.

The mortgagor cannot determine the tenancy at will created by agreement by transferring his interest to another without

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(*k*) *Walker* v. *Giles*, 6 C. B. 662; *Pinhorn* v. *Souster*, 8 Exch. 763; *Brown* v. *Metropolitan, &c. Insurance Soc.*, 1 E. & E. 832; *Turner* v. *Barnes*, 2 B. & S. 435.

(*l*) *Doe* v. *Davies*, 7 Exch. 89.

(*m*) *Doe* v. *Cox*, 11 Q. B. 122.

(*n*) *Morton* v. *Woods*, L. R. 4 Q. B. 294.

(*o*) *Doe* v. *Cadwallader*, 2 B. & Ad. 473; *Scobie* v. *Collins*, (1895) 1 Q. B. 375.

(*p*) *Doe* v. *Hales*, 7 Bing. 322; *Doe* v. *Olley*, 12 A. & E. 481.

(*q*) *Dobson* v. *Land*, 8 Ha. 216.

(*r*) *Warner* v. *Jacob*, 20 Ch. D. 220.

(*s*) *Doe* v. *Maisey*, 8 B. & Cr. 767.

(*t*) *Cholmondeley* v. *Clinton*, 2 Mer. 171 at p. 359.

notice to the mortgagee, so as to affect his right of distress (*u*); and a tenancy at will which existed before the mortgage is not determined by the mortgage (*x*).

Statute of Limitations.

The mortgagor is not tenant at will of the mortgagee within the meaning of the provision in the Statute of Limitations, that when any person shall be in possession or receipt of the rents and profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action, shall be deemed to have first accrued at the determination, or at the expiration of one year next after the commencement of such tenancy (*y*). But where the mortgage has been paid off without any reconveyance the mortgagor is a tenant at will under sect. 7 (*z*).

Delivery of possession under County Courts Act.

Unless a strict tenancy is created between mortgagee and mortgagor in possession by payment of rent or otherwise, there is no jurisdiction, under sect. 138 of the County Courts Act (*a*), to order delivery of the mortgaged property to the mortgagee (*b*).

Mortgagor holding over after default is tenant at sufferance or trespasser.

iv.—**When the Mortgagor is Tenant at Sufferance.**—If a mortgagor in possession under an express proviso that he shall continue in possession till default hold over after default without any new agreement, he will not necessarily be deemed to be more than a tenant at sufferance of the mortgagee (*c*). "A tenant at sufferance is where a man cometh to the possession first lawfully and holdeth over" (*d*). If the mortgagor has made default in payment of the principal and interest on the day appointed by the mortgage deed, generally six months from the date thereof, the operation of the proviso ceases, and thereupon the mortgagor, like any other tenant at sufferance, becomes liable to eviction by the mortgagee without notice or demand of possession (*e*), and will not be entitled to emble-

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(*u*) *Pinhorn* v. *Souster*, 8 Exch. 763.

(*x*) *Doe* v. *Carter*, 9 Q. B. 863.

(*y*) 3 & 4 Will. IV. c. 27, s. 7.

(*z*) *Sands* to *Thompson*, 22 Ch. D. 614.

(*a*) 51 & 52 Vict. c. 43.

(*b*) *Jones* v. *Owen*, 18 L. J. Q. B. 8; *Re Banks*, 15 Jur. 657 (cases decided under sect. 122 of the stat. 9 & 10 Vict. c. 95).

(*c*) *Powseley* v. *Blackman*, Cro. Jac. 659; *Smartle* v. *Williams*, 1 Salk. 245; *Thunder* v. *Belcher*, 3 East, 449; *Doe* d. *Roby* v. *Maisey*, 8 B. & Cr. 767; *Scobie* v. *Collins*, (1895) 1 Q. B. 375.

(*d*) Co. Lit. 217a.

(*e*) *Doe* v. *Giles*, 5 Bing. 421. See further as to mortgagee in possession, *post*, Chap. XLII., Sect. II.

ments (*f*). He may, at the option of the mortgagee, be treated as tenant or trespasser (*g*).

Effect of transfer of mortgage.

If the mortgage is transferred to a third person, the mortgagor becomes a mere tenant by sufferance of the transferee, who might formerly bring ejectment against the tenants of the mortgagor without notice to quit (*h*). But now, under the Tenants' Compensation Act, 1890 (*i*), the tenant has a right to six months' notice.

Attornment clauses.

v.—Attornment Clauses.—In order to create the relation of landlord and tenant between the mortgagor and mortgagee, clauses of attornment by the mortgagor to the mortgagee are sometimes inserted in mortgages, where the mortgagor is himself in occupation of the mortgaged property; but it makes no difference to the rights of the mortgagee under the clause if the property is afterwards let by the mortgagor to an undertenant (*k*).

Attornment clauses have in great measure fallen into disuse in consequence of the *dicta* of James and Bramwell, L. JJ., in *Re Stockton Iron Furnace Co.* (*l*), that the effect of such clauses is to render mortgagees liable as mortgagees in possession to account as against any second mortgagees or incumbrancers for rent received, or which but for their wilful default they might have received. The *dicta* were adopted by Jessel, M.R., in *Exp. Punnett* (*m*); but Bacon, V.-C., in *Stanley* v. *Grundy* (*n*), refused to follow them. Having regard to this risk, it has very generally been considered by conveyancers that it is not advisable to insert these clauses in mortgage deeds.

Moreover, by recent statutory enactments, mortgagees have now been deprived of a great advantage formerly attaching to attornment clauses, namely, that by creating a tenancy such clauses enabled the mortgagee to distrain for the rent reserved thereby, thus affording him an easy and expeditious mode of enforcing the payment of his interest instead of being obliged to enter into actual possession of the property.

(*f*) *Bagnall* v. *Villar*, 12 Ch. D. 812.

(*g*) *Doe* d. *Robey* v. *Maisey*, 8 B. & Cr. 767.

(*h*) *Thunder* v. *Belcher*, 3 East, 449; *Howe* v. *Hunt*, 31 Beav. 420.

(*i*) 53 & 54 Vict. c. 57.

(*k*) *Kearsley* v. *Philips*, 11 Q. B. D. 620. See Co. Lit. 311 a.

(*l*) 10 Ch. D. at p. 356.

(*m*) 16 Ch. D. 235.

(*n*) 22 Ch. D. 478. See also 22 Ch. D. at p. 391.

Avoidance of attornment clauses by Bills of Sale Acts as regards power of distress.

The Bills of Sale Act, 1878 (*o*), enacts that attornments and other instruments giving powers of distress by way of security, shall be deemed bills of sale, within the meaning of the Act, of any personal chattels which may be seized thereunder, and accordingly will be void as regards such property, unless registered in accordance with the requirements of the Act. And by the Bills of Sale Act, 1882 (*p*), every bill of sale given by way of security is required to have a schedule of the personal chattels comprised therein, and is void, except as against the grantor, in respect of any chattels not specifically described in the schedule; but it has been held that attornments need not be in accordance with the form prescribed by the Act (*q*).

The effect of the above enactments is to render an attornment clause in a mortgage wholly inoperative as regards the power of distress, whether such power is expressly given or is relied on as incident to the demise for the purpose of enabling the mortgagee to seize personal chattels not assigned to him by the mortgage (*r*), unless the mortgagee has actually entered into possession of the land, and, being in possession, has demised it to the mortgagor at a fair and reasonable rent (*s*).

Validity of attornment clauses in other respects.

But, inasmuch as the Bills of Sale Acts do not include within their scope and operation real property, it has been held that attornment clauses, though invalid so far as they purport to give power to distrain personal chattels, are of effect, in other respects, in creating the relation of landlord and tenant between the parties, *e.g.*, so as to enable the mortgagee to recover the land by summary process under Ord. III. r. 6, and Ord. XIV. r. 1 (*t*).

There is, however, another difficulty. Where a bill of sale is void under sect. 9 of the Act of 1882, it is void not only as to the charge, but also as to the covenant for payment (*u*). Although this would not affect the mortgage of the land, it would be better, in order to avoid any question as to its effect on the covenant for payment, that the attornment should be

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(*o*) 41 & 42 Vict. c. 31, s. 6, set out *ante*, p. 209.

(*p*) 45 & 46 Vict. c. 43, s. 4.

(*q*) *Green* v. *Marsh*, (1892) 2 Q. B. 330, 335, C. A.

(*r*) *Re Willis, Exp. Kennedy*, 21 Q. B. D. 384, C. A. See *Green* v. *Marsh*, *sup.*

(*s*) See the saving proviso at the end of sect. 6 of the Act of 1878.

(*t*) *Daubuz* v. *Lavington*, 13 Q. B. D. 347. See *Hall* v. *Comfort*, 18 Q. B. D. 11; *Mumford* v. *Collier*, 25 Q. B. D. 279; *Kemp* v. *Lester*, *inf.*

(*u*) *Davies* v. *Rees*, 17 Q. B. D. 408; *Smith* v. *Whiteman*, (1909) 2 K. B. 437.

made by a separate instrument, or that words be inserted stating that the rent shall not be recoverable by distress (*x*).

Attornment by mortgagor will not bind heir.

Where a mortgage contained an attornment clause in the usual form, the mortgagor died, and his heir occupied and paid interest: it was held that the attornment clause created a mere tenancy at will which came to an end at the mortgagor's death, and that the payment of interest by the heir was not referable to payment of rent, he not having attorned, and therefore created no new tenancy (*z*). If the heir had himself attorned, he would have become tenant at will (*a*).

Attornment by mortgagor binds him after death of mortgagee.

Where the mortgagor had attorned to the mortgagee at a rent, and after the death of the mortgagee remained in possession and paid rent to his devisees, the subsequent occupation, coupled with the provisions of the deed, constituted the relation of landlord and tenant, though receipts were given as for interest, and the deed was executed only by the mortgagor (*b*).

Successive attornments.

An attornment by a mortgagor to a second mortgagee is valid although there was an attornment by him to the prior mortgagee (*c*).

Attornment to receiver.

If a receiver is appointed, the attornment should be to him; and if he be appointed by a separate deed, the attornment should be by that deed (*d*).

Term of tenancy.

The tenancy created should be a tenancy from year to year, and not a tenancy at will only, as in the latter case it would be determined by the death of either party (*e*); but even where the tenancy is at will, it is not determined by the alienation of the mortgagor without notice to the mortgagee (*f*); and the mortgagor is tenant both in law and equity (*g*).

A tenancy under the attornment clause from year to year is not inconsistent with a power to enter and determine the tenancy (*h*). So, where under the mortgage deed the mortgagor became tenant to the mortgagee at a rent, but the mortgagee had a power of immediate entry on default in payment, it was held that the mortgagee might, on default made, eject

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(*x*) Key & Elph. (9th ed.) vol. ii. 67, 68.

(*z*) *Scobie* v. *Collins*, (1895) 1 Q. B. 375.

(*a*) *West* v. *Fritche*, 3 Exch. 216.

(*b*) *Ibid.*

(*c*) *Exp. Punnett*, 16 Ch. D. 226.

(*d*) Dav. Conv. vol. ii. pt. ii. p. 93.

(*e*) *Turner* v. *Barnes*, 2 B. & S. 435, 447—449.

(*f*) *Pinhorn* v. *Souster*, 8 Exch. 763, 768, 770.

(*g*) *Anderson* v. *Midland Rail. Co.*, 3 E. & E. 614.

(*h*) *Re Threlfall*, 16 Ch. D. 274, C. A.

the mortgagor without notice to quit, or demand of payment (*i*), and that a distress for *rent* under the deed did not prevent the mortgagee from treating the mortgagor as a trespasser in respect of a *subsequent* default (*k*). And in such a case, the mortgagee may specially indorse the writ under R. S. C., Ord. III. r. 6 (f), and apply for summary judgment under Ord. XIV. (*l*).

Reservation of rent in attornment clauses.

The provision consists of an attornment by the mortgagor to the mortgagee at a rent usually the same in amount, and payable on the same half-yearly days, as the interest, with a proviso enabling the mortgagee to enter without notice and determine the tenancy (*m*). Upon assignment by the mortgagee, the power of distress for the arrears of interest is gone (*n*).

In the ordinary attornment clause, either the rent reserved is as of the same amount as the interest, or, if in excess, the surplus is applicable towards discharge of the principal (*o*).

The rent reserved must be fair and reasonable (*p*). The rent is sometimes made up partly of interest and partly of the principal, and if not unreasonable in regard to the value of the premises the tenancy will be valid (*q*).

The attornment creates a tenancy by estoppel (*r*); but the mortgagee is none the less a mortgagee because he is also landlord. The tenancy is created for better securing the interest.

But if the rent is exorbitant, or if there is an arrangement that the attornment clause is only to come into operation upon bankruptcy, it will be a device to give a fraudulent preference and be void (*s*).

Fluctuating rent.

It was held no objection to an attornment clause that the monthly rent was fluctuating in amount (*t*).

(*i*) *Doe* v. *Tom*, 4 Q. B. 615; *Doe* v. *Olley*, 12 A. & E. 481. But see *Clowes* v. *Hughes*, L. R. 5 Ex. 160.

(*k*) *Doe* v. *Olley*, *sup.*

(*l*) *Kemp* v. *Lester*, (1896) 2 Q. B. 162, C. A.

(*m*) Dav. Conv. vol. ii. pt. ii. p. 95.

(*n*) *Brown* v. *Metropolitan, &c. Insurance Soc.*, 1 E. & E. 832; *Re Davis*, 22 Q. B. D. 193.

(*o*) Dav. Conv. vol. ii. pt. ii. p. 96. See also *Exp. Harrison, Re Betts*, 18 Ch. D. 127, C. A.; *Exp. Voisey, Re Knight*, 21 Ch. D. 442, C. A.

(*p*) *Exp. Williams*, 7 Ch. D. 138; *Re Stockton Furnace Co.*, 10 Ch. D. 335, C. A.; *Exp. Jackson, Re Bowes*, 14 Ch. D. 725, C. A. See *Exp. Voisey, Re Knight*, 21 Ch. D. 442.

(*q*) *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335, C. A.; *Exp. Punnett*, 16 Ch. D. 226, C. A.; *Exp. Isherwood*, 22 Ch. D. 384; *Exp. Voisey, Re Knight, sup.*

(*r*) *Exp. Punnett*, 16 Ch. D. 226, C. A. See *Exp. Voisey, Re Knight, sup.*, at p. 452.

(*s*) *Exp. Williams*, 7 Ch. D. 138; *Exp. Jackson, Re Bowes*, 14 Ch. D. 725, C. A.; *Re Knight*, 46 L. T. 539. See *Exp. Barter*, 26 Ch. D. 510.

(*t*) *Exp. Voisey, Re Knight*, 21 Ch. D. 442.

Power of distress.

vi.—Power of Distress.—Formerly a mortgagor in occupation of the property was sometimes required, instead of attorning, to give to the mortgagee a power of distress, which did not of itself create any tenancy (*u*).

The insertion of powers of distress in mortgage deeds is, however, now useless, and has fallen into disuse. Although the insertion of such a power may not render the mortgage a bill of sale within the meaning of the Bills of Sale Acts by virtue of sect. 6 of the Act of 1878 (*x*), unless a rent is reserved by such instrument, yet it has been held that the power falls within the definition of bills of sale contained in sect. 4 of that Act, as being a licence "to take possession of chattels as security for a debt," and is void accordingly, as not being in conformity with the requirements of the Act of 1882 (*y*); but the insertion of the power will not of itself vitiate the instrument as regards the other stipulations contained in it (*z*).

Mortgagee in possession may distrain.

A mortgagee who has taken possession and re-let the premises to the mortgagor is entitled to distrain; this right is expressly saved by sect. 6 of the Act of 1878 (*a*).

Mortgagor not accountable for rents.

vii.—Mortgagor in Possession entitled to Rents and Profits.—A mortgagor is not bound to account for the rents and profits while in possession, even although the security prove insufficient (*b*).

In a case (*c*) where a mortgage was made for 1,000*l.*, and the property was in lease, the mortgagor became bankrupt. The mortgagee gave the tenant notice to pay the rent to him. The assignees nevertheless received the rent. A petition by the mortgagee that the assignees might be ordered to pay to the petitioner the rent received was dismissed. The mortgagor does not receive the rent for the mortgagee.

Appointment of receiver.

Where the mortgagor in possession had consigned the crops of a West India estate to the consignee in England, and the bills of lading had been signed prior to an order of the Court

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(*u*) *Chapman* v. *Beecham*, 3 Q. B. 723.

(*x*) 41 & 42 Vict. c. 31.

(*y*) 45 & 46 Vict. c. 43.

(*z*) *Stevens* v. *Marston*, 60 L. J. Q. B. 192.

(*a*) *Ante*, p. 210.

(*b*) 3 Ves. 25; *Hele* v. *Lord Bexley*, 20 Beav. 127; *Ford* v. *Rackham*, 17 Beav. 485; *Life Assoc. of Scotland* v. *Siddall*, 3 De G. & J. 271.

(*c*) *Exp. Wilson*, 2 V. & B. 252. And see *Bertie* v. *Lord Abingdon*, 3 Mer. 560.

for the appointment of a receiver, it was held that the receiver was not entitled to the produce of the sale of such part of the crops as was unconverted at the date of the order. And the above principle applies to the heir or devisee of an estate charged with portions, &c., unless in an administration suit, and the estate be a deficient security (*d*).

Surplus rents paid into Court by receiver.

So, where a receiver had been appointed over a settled estate which was subject to a mortgage in fee, a mortgagee of the interest of the tenant for life, who had taken no steps to recover his debt and interest during the lifetime of the tenant for life, was held not to be entitled to an account of surplus moneys paid into Court by the receiver, but such moneys were held to form part of the personal estate of the deceased mortgagor (*e*).

Where under certain proceedings in Chancery not relating to the mortgage a receiver had been appointed, and the surplus rents paid into Court, and part of the money being due when the mortgage term expired by effluxion of time, the mortgagee applied to the Court to be paid the remaining debt out of the fund in Court, but without success (*f*). And in a similar case the same result followed, although the mortgagee had given notice to the tenants to pay him the rents, which, by reason of the appointment of the receiver, was disregarded. The mortgagee should have applied to the Court to divest the possession of the receiver (*g*). But where there was a sequestration in another suit, an equitable mortgagee was held entitled to back rents in the hands of the sequestrator (*h*).

Effect of bankruptcy of mortgagor.

After decree for sale of a bankrupt's legal mortgage, the trustee is entitled to the rents till the time of sale (*i*), unless the mortgagee makes actual entry or gives notice to the tenants to pay the rents to him (*i*). *Secus*, as to an equitable mortgagee, who is entitled from the date of the order (*k*), or from time of entry (*l*), if the trustee has acquiesced; nor can the mortgagor be viewed in the light of a receiver; and, in fact, a receivership without liability to account appears a contradiction in terms, it being in truth an ownership.

(*d*) *Codrington* v. *Johnston*, 1 Beav. 520.

(*e*) *Lord Clarendon* v. *Barham*, 1 Y. & C. C. C. 688, 704.

(*f*) *Gresley* v. *Adderley*, 1 Swanst. 573.

(*g*) *Thomas* v. *Brigstocke*, 4 Russ. 64; *Preston* v. *Tunbridge Wells Opera House*, (1903) 2 Ch. 323.

(*h*) *Tatham* v. *Parker*, 1 Jur. N. S. 992.

(*i*) *Exp. Living, Re Tombs*, 2 M. & A. 223.

(*k*) *Exp. Bignold*, 2 M. & A. 16.

(*l*) *Ibid.* 214.

Chap. XXXVI. (viii.)

Waste by mortgagor.

viii.—Waste by Mortgagor.—Although in equity the mortgagor remains the actual owner of the land until foreclosure, and is entitled, while in possession, to the receipt of the rents and profits without account, yet equity, regarding the land with all its produce as a security for the mortgage debt, will restrict the right of ownership within those bounds which may not operate to the detriment or injury of the mortgagee (*m*).

Felling timber.

On this principle equity will interfere to prevent waste by the mortgagor, and for that purpose grant an injunction on action brought by the mortgagee (*n*). If, after a decree for foreclosure, the mortgagor in possession begins to commit waste, he will be restrained by injunction, though no injunction be prayed by the action (*o*). But the mortgagee is not, as a matter of course, entitled to an injunction to prevent the felling of timber by the mortgagor; the Court must first be satisfied that the security is insufficient (*p*); but it was refused to a judgment creditor under the old law, suing the debtor's heir-at-law, by whom a satisfied mortgage term and an alleged fraudulent conveyance by the debtor was set up, on the ground that the plaintiff might have no interest in the property (*q*).

Parting with legal estate.

An equitable mortgagee can obtain *ex parte* an injunction restraining the mortgagor from parting with the legal estate (*r*).

User of trade name.

A mortgagee of a business, goodwill, and right to use the name, but who has never used it, can have an injunction against a person claiming under the mortgagor to prevent his using the name (*s*).

Fixtures.

Where a mortgagor of leaseholds remains in possession, and becomes bankrupt, the mortgagee may recover against his assignees for the removal of fixtures, whether landlord's or tenant's, from the premises, though at the end of the term they are required to be all delivered to the lessor (*t*).

(*m*) *Kekewich* v. *Marker*, 3 Mac. & G. 329.

(*n*) *Farrant* v. *Lovel*, 3 Atk. 723. And see *Robinson* v. *Litton*, 3 Atk. 210; *Harper* v. *Applin*, 54 L. T. 383.

(*o*) *Goodman* v. *Kine*, 8 Beav. 379.

(*p*) *King* v. *Smith*, 2 Ha. 239; *Usborne* v. *Usborne*, 1 Dick. 75. See *Hampton* v. *Hodges*, 8 Ves. 105; *Hippesley* v. *Spencer*, 5 Madd. 422; *Humphreys* v. *Harrison*, 1 J. & W. 581.

(*q*) *Leake* v. *Beckett*, 1 Y. & J. 339.

(*r*) *London and County Bank* v. *Lewis*, 21 Ch. D. 490, C. A.

(*s*) *Beazley* v. *Soares*, 22 Ch. D. 660.

(*t*) *Hitchman* v. *Walton*, 4 M. & W. 409. See further as to fixtures, *ante*, Chap. X., Sect. II. (viii).

Sale of goods in course of business.

Where a bill of sale of a farm and stock contains an implied licence to the grantor to carry on the farm and sell the stock, a sale to a *bonâ fide* purchaser is binding on the grantee (*u*), but not if the sale is out of the ordinary way of business (*x*).

Growing crops.

A mortgagor cannot cut or remove growing crops after the mortgagee has demanded possession (*y*). So a mortgagee who had taken possession after the bankruptcy of the mortgagor, was held to be entitled to an injunction to restrain the bankruptcy trustee from cutting and removing growing crops from the mortgaged lands (*z*).

(*u*) *National Mercantile Bank* v. *Hampson*, 5 Q. B. D. 177; *Walker* v. *Clay*, 49 L. J. C. P. 560. See *Moore* v. *Shelley*, 8 App. Ca. 285, 290.

(*x*) *Taylor* v. *McKeand*, 5 C. P. D. 358.

(*y*) *Bagnall* v. *Villar*, 12 Ch. D. 812.

(*z*) *Re Gordon*, 61 L. T. 299.

CHAPTER XXXVII.

THE RELATIVE RIGHTS OF MORTGAGORS AND MORTGAGEES WITH RESPECT TO LESSEES AND TENANTS OF MORTGAGED LANDS.

Mortgagee takes subject to subsisting leases, &c.

i.—As to Leases, &c. subsisting at the Date of the Mortgage. —The mortgagor can give to the mortgagee no better title than he has himself, and consequently the latter, by the mortgage conveyance, takes the property subject to all leases and tenancies subsisting at the date thereof (*a*).

Mortgagee's right to rents.

By the conveyance the reversion passes to the mortgagee, and with it the right to future rents and other rights incident to the reversion (*b*); but arrears of rent do not pass without express words (*c*).

Payment of rent to mortgagor.

The tenant may, however, continue to pay the rent to the mortgagor so long as he is allowed by the mortgagee to receive it; for though the conveyance is effectual as to the mortgagee's rights against the tenant without any attornment (*d*) by the latter, the tenant is not prejudiced by payment of the rent to the mortgagor, or by breach of any condition for non-payment of rent before notice of the mortgage (*e*).

But if the tenant pay the rent to the mortgagor after notice to pay the mortgagee, and is afterwards compelled to pay the latter, the payment, being voluntary, cannot be recovered from the mortgagor (*f*).

Effect of notice to pay rents to mortgagee.

Where the demise is either prior to the mortgage, or is made under a power in the mortgage deed, and therefore contemporaneous with it in point of effect (*g*), the notice of the mortgage to the tenant in possession operates as an attornment at common

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(*a*) See *Cumberland Union Banking Co.* v. *Maryport Hematite Iron Co.* (No. 2), (1892) 1 Ch. 415.

(*b*) *Trent* v. *Hunt*, 9 Exch. 14; *Rogers* v. *Humphreys*, 4 A. & E. 299.

(*c*) *Salmon* v. *Dean*, 3 Mac. & G. 344.

(*d*) 4 Anne, c. 16, s. 9.

(*e*) *Ibid.* s. 10.

(*f*) *Higgs* v. *Scott*, 7 C. B. 63.

(*g*) *Rogers* v. *Humphreys*, 4 A. & E. 299.

law, having relation back to the time of the grant, and it follows that all the rents due from the tenant at the time of the notice, and not actually paid over to the mortgagor (*h*), and all subsequent rent, belong of right to the mortgagee, who may distrain or sue for them (*i*), or if the tenant holds from year to year, or under an agreement, may recover them in an action for use and occupation (*k*); and that, too, though the mortgagor has, after the mortgage, altered the property and raised the rent (*l*).

Rents in arrear.

The principle of *Moss* v. *Gallimore* and *Rogers* v. *Humphreys* that the mortgagor is in possession and receives the rents of the mortgaged property only by leave of the mortgagee, and the mortgagee is the reversioner expectant on leases of the mortgaged property, and is entitled on taking possession to all arrears of rent in respect of leases made before the date of the mortgage or subsequently by the authority of the mortgagee, is not affected by sect. 25 (5) of the Judicature Act, 1873, nor by sect. 10 (1) of the Conveyancing Act, 1881 (*m*).

Distress by mortgagee.

The mortgagee, although the assignee of the reversion, cannot distrain or sue for rent accrued, or for breaches of covenant, prior to the assignment (*n*). If the assignment include in terms the previous arrears, still the mortgagee could not distrain (*o*), although he could recover the arrears like any other choses in action assigned to him (*p*).

Parol tenancy.

When a tenant under a parol contract assigns his interest, but the assignee is not accepted by the mortgagor, a subsequent mortgagee cannot sue the tenant, parol contracts not being incident to the reversion (*q*).

Equitable mortgagee.

Although an equitable mortgagee has no legal right to the rents of the mortgaged property, yet if rent has been paid to him after notice that he claims it as equitable mortgagee, he cannot be compelled to refund it (*r*).

Notice to quit.

If the land, at the time of the mortgage, be in the occupation

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(*h*) See 4 Anne, c. 16, ss. 9, 10.

(*i*) *Moss* v. *Gallimore*, 1 Doug. 279; *Rogers* v. *Humphreys*, 4 A. & E. 299.

(*k*) *Birch* v. *Wright*, 1 T. R. 378; *Rawson* v. *Eicke*, 7 A. & E. 451; *Exp. Hankey*, 1 M. & McA. 247.

(*l*) *Burrows* v. *Gradin*, 12 L. J. Q. B. 333; 1 Dowl. & L. 313.

(*m*) *Re Ind, Coope & Co.*, (1911) 2 Ch. 223.

(*n*) *Flight* v. *Bentley*, 7 Sim. 149; *Hunt* v. *Remnant*, 9 Exch. 635; *Johnson* v. *St. Peters*, 4 A. & E. 520; *Martin* v. *Williams*, 1 H. & N. 817.

(*o*) *Metrop. Counties Soc.* v. *Brown*, 1 E. & E. 832.

(*p*) *Salmon* v. *Dean*, 3 Mac. & G. 344.

(*q*) *Allcock* v. *Moorhouse*, 9 Q. B. D. 366, C. A.

(*r*) *Finck* v. *Tranter*, (1905) 1 K. B. 427.

of a tenant from year to year, he will be entitled to the usual notice to quit (*s*).

Tenancy at will.

A tenancy at will is determined by a mortgage of the premises by the landlord, such mortgage being brought to the knowledge of the tenant (*t*). If the tenant remains in possession a new tenancy will be created by estoppel (*u*).

Liability of mortgagee on covenants.

A mortgagee is not liable to affirmative covenants not running with the land, although he has notice (*x*).

Anomalous position of mortgagor in possession before the Judicature Act.

Formerly, serious inconveniences attended the position of a mortgagor who was allowed to remain in possession of the mortgaged lands as regards his remedies for enforcing payment of rent against persons holding under leases and tenancies subsisting at the date of the mortgage. Thus, the mortgagor, having conveyed away the legal estate, could not sue the tenant in ejectment (*y*), and he could only distrain by virtue of an implied authority from the mortgagee, which, apparently, the latter could at any time determine by notice (*z*).

Powers of mortgagor under the Judicature Act.

Some of the difficulties of the mortgagor, whilst he was allowed to remain in possession by the mortgagee, have been removed by sect. 25, sub-sect. (5), of the Judicature Act, 1873 (*a*); by which it is thus enacted:

Suits for possession of land, &c. by mortgagors.

> "A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

Under the Act, until notice is given by the mortgagee, no action can be brought by him on the matters referred to in this sub-section; otherwise the same causes of action would vest in both the mortgagor and mortgagee at the same time.

A mortgagor may, until such notice is given, bring an action for an injunction in his own name to prevent a breach of a

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(*s*) *Birch* v. *Wright,* 1 T. R. 378, 383.

(*t*) *Jarman* v. *Hale,* (1899) 1 Q. B. 994.

(*u*) *Ibid.*

(*x*) *Haywood* v. *Brunswick Building Soc.*, 8 Q. B. D. 403, C. A.

(*y*) *Marriott* v. *Edwards,* 5 B. & Ad. 1065.

(*z*) *Trent* v. *Hunt,* 9 Exch. 14; *Snell* v. *Finch,* 13 C. B. N. S. 657, 658.

(*a*) 36 & 37 Vict. c. 66.

restrictive covenant by a tenant without making the mortgagee a party, unless his security is likely to be affected (*b*).

But a mortgagor entitled to the possession of land subject to a lease made before the Conveyancing Act, cannot bring an action to recover possession on a forfeiture for breach of covenant in the lease, although the mortgagee is joined as plaintiff, such mortgagee not having given notice to the lessee under the Conveyancing Act, 1881, s. 14 (*c*).

Nor can a mortgagor as reversioner sue for possession of the mortgaged property and damages on the ground of breach of covenant in a lease granted before the mortgage (*d*).

Mortgagor's right to sue on covenants.

But sect. 10 of the Conveyancing Act, 1881, which applies only to leases made after the Act, confers on a mortgagor in possession subject to a lease made before the mortgage, the right to maintain an action, in his own name and without making the mortgagee a party, for damages for breach of covenant to repair by the lessee, although such right is not conferred by the Judicature Act, 1873, s. 25 (5) (*e*).

Concurrence of mortgagor and mortgagee generally necessary.

ii.—Leases granted by Mortgagors and Mortgagees jointly.—The concurrence of both the mortgagor and mortgagee is required for the demise of lands in mortgage, unless the lease is granted by the mortgagor alone in exercise of an express power of leasing contained in the mortgage, or in exercise of the statutory powers of leasing hereafter to be considered (*f*).

Lessee's covenants with mortgagor are in gross.

If a mortgagor, who has parted with the legal estate in the land, and who has consequently an equity of redemption only, joins with his mortgagee in a lease of the premises, and the lessee enters into covenants with the mortgagor and his assigns, these covenants, being collateral to the land, will neither descend at common law to the heir of the mortgagor, nor pass to an assignee of the mortgagee under 32 Hen. VIII. c. 34, but will be covenants in gross, on which actions must be brought in the name of the mortgagor or his personal representatives. This point was decided in *Webb* v. *Russell* (*g*), where it was held that

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(*b*) *Fairclough* v. *Marshall*, 4 Ex. D. 37.

(*c*) *Matthews* v. *Usher*, (1900) 2 Q. B. 535.

(*d*) *Molyneux* v. *Richard*, (1906) 1 Ch. 34; but see *Turner* v. *Walsh*, *inf.*

(*e*) *Turner* v. *Walsh*, (1909) 2 K. B. 484.

(*f*) *Post*, p. 708.

(*g*) *Webb* v. *Russell*, 3 T. R. 393;

where a covenant is made with the mortgagor only, and therefore in contemplation of law made with a stranger to the land, the benefit of the covenant did not run with the land. But as in contemplation of equity a mortgagor is the true owner of the land, a covenant clearly made for the benefit of the land with the mortgagor will be regarded in equity as annexed to and running with the land (*h*).

For the reason that the covenants are in gross, the mortgagor, though the reversion is extinguished, may sue the lessee (*i*).

Covenant for quiet enjoyment by mortgagor.

Conversely, if the mortgagor enters into the lessor's covenant for quiet enjoyment, &c., then, inasmuch as the legal estate is in the mortgagee, such covenants are covenants in gross only, and do not run with the land so as to bind the legal reversion. A covenant for quiet enjoyment from both lessors would, in the absence of any express covenant, be implied (*k*); and if the mortgagee does not covenant for quiet enjoyment words should be inserted to exclude the implied covenant arising from the word "demise" or "let" (*l*); but an express covenant by the mortgagor excludes such implication (*m*).

With whom lessee's covenants should be made.

Where, therefore, a lease is made by a mortgagee and mortgagor, the lessee's covenants should be made with the mortgagee as the owner for the time being of the legal estate; and when the mortgage is paid off and the estate is reconveyed to the mortgagor, the right to sue on such of the covenants as run with the land will pass to the mortgagor as incident to the reversion (*mm*).

Effect of several covenants with mortgagor and mortgagee.

On a demise by the mortgagee with the concurrence of the mortgagor, a covenant entered into by the tenant with them both severally to pay rent to the mortgagee until payment of the mortgage debt, and then to the mortgagor, is a covenant running with the land until the mortgage is discharged, and then becomes a covenant in gross; and during the continuance of the mortgage, it was held that the action was properly brought by the mortgagee alone, and that the payment of the mortgage money was a condition subsequent operating in

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cf. *Muller* v. *Trafford*, (1901) 1 Ch. 54.

(*h*) *Rogers* v. *Hosegood*, (1900) 2 Ch. 388, C. A.

(*i*) *Stokes* v. *Russell*, 3 T. R. 678; *Thwaites* v. *McDonough*, 2 Ir. Eq. R. 97.

(*k*) *Coleman* v. *Sherwin*, 1 Salk. 137.

(*l*) *Markham* v. *Paget*, (1908) 1 Ch. 697.

(*m*) *Noakes' Case*, 4 Rep. 80; *Smith* v. *Pocklington*, 7 Sc. 69.

(*mm*) See *post*, p. 708.

defeasance of the covenant with the mortgagee, and must be pleaded (*n*); but in other cases (*o*) it was held that the action should be brought in the joint names.

Reservation of rent.

So, also, in leases by mortgagor and mortgagee, the rent should be reserved to the mortgagee, or generally, the effect of which will be that the benefit of such reservation will, on reconveyance, pass with the estate to the mortgagor.

Right of entry.

A right of entry in a lease could not before the Conveyancing Act, 1881, be reserved to a stranger, and, therefore, if it appeared on the face of the lease that the legal estate was in the mortgagee or a trustee for him, and the right of entry was reserved to the mortgagor, it was void (*p*).

Operation of joint lease.

A joint lease by mortgagee and mortgagor operates as a lease by the mortgagee, and an equitable confirmation by the mortgagor, who is in law a stranger to the estate; so a covenant by the mortgagor cannot be implied as incident to the demise, and he cannot be sued jointly with the mortgagee (*q*).

Power of sale.

Where a mortgagee of leaseholds joins with the mortgagor in leasing part of the premises, although for the residue of the term, and the rent and power of re-entry is reserved to the mortgagor, but it is provided that the rights of the mortgagee on the entirety of the estate are to remain unaffected, the mortgagee will in equity be entitled to the rent, but he will not be allowed to defeat the lease by his power of sale (*r*).

Lease by mortgagee as agent.

Where a mortgagee who was not in possession, but collected the rents as agent of the mortgagor, granted a lease "as agent" and afterwards sold the premises, it was held that the demise was the demise of the mortgagee, and that the purchaser could enforce any covenant in the lease which ran with the reversion (*s*).

Leases by mortgagor do not generally bind mortgagee.

iii.—Leases, &c. improperly granted by Mortgagor after the Mortgage.—Independently of sect. 18 of the Conveyancing Act, 1881 (*t*), which applies only in case of a mortgage made

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(*n*) *Harrold* v. *Whitaker*, 11 Q. B. 147, 163.

(*o*) *Wakefield* v. *Brown*, 9 Q. B. 209; *Magnay* v. *Edwards*, 13 C. B. 479. See as to these cases 1 Sm. L. C. (11th ed.) 74, 75.

(*p*) *Doe* v. *Lawrence*, 4 Taunt. 23; *Doe* v. *Adams*, 2 Cr. & J. 232; *Saunders* v. *Merryweather*, 3 H. & C. 902.

(*q*) *Smith* v. *Pocklington*, 7 Sc. 69.

(*r*) *Edwards* v. *Jones*, 1 Coll. 247.

(*s*) *Chapman* v. *Smith*, (1907) 2 Ch. 97.

(*t*) 44 & 45 Vict. c. 41, s. 18, set out *post*, p. 708.

after the commencement of this Act, a mortgagor cannot, after the date of the mortgage, and in the absence of an express power in that behalf, or the concurrence of the mortgagee, create a lease or tenancy which will bind the mortgagee, and if he purports to create such a lease or tenancy, the mortgagee or his transferee may proceed to eject the lessee or tenant (*u*).

Power for mortgagor to lease.

As it was often one of the terms of the arrangement for a loan that the mortgagor should be able to grant leases independently of the mortgagee, an express power of leasing was frequently given to the mortgagor by the mortgage deed. The validity of a lease so granted will, of course, depend upon its having been made in strict compliance with the terms of the power.

Specific performance.

The mortgagor not being able by himself to make a valid lease in the absence of an express power, it was held that, in order to enforce specific performance of an agreement for a lease, he must have obtained a prior reconveyance from the mortgagee, or procured the latter to concur in the lease (*x*). In that case, it seems to have been considered that the tenant could not, under an agreement for a lease, compel the mortgagor to redeem for the purpose of granting a valid lease, on the principle that specific performance will not be decreed where it is unreasonable to do so (*y*).

Notice to quit.

Notice to quit was not necessary in an action against a tenant subsequent to the mortgage, though the mortgagee covenanted not to take possession without twelve months' notice (*z*); and after default in payment of the mortgage money, the mortgagee might treat such a tenant as a trespasser (*a*). But now, under the Tenants Compensation Act, 1890, an agricultural or allotment tenant is entitled to six months' notice. And if threatened with eviction, he has the right to redeem (*b*).

Right to emblements.

On the eviction of the lessee he was not entitled to *emblements;* the point was raised in *Keech* v. *Hall* (*c*), but did not call for a decision, the Court only remarking that the

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(*u*) *Doe* v. *Maisey*, 8 B. & Cr. 767; *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454.

(*x*) *Costigan* v. *Hastler*, 2 Sch. & L. 160.

(*y*) See *Watson* v. *Marston*, 4 De G. M. & G. 230, 239.

(*z*) *Doe* v. *Davies*, 7 Exch. 89.

(*a*) *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454.

(*b*) *Tarn* v. *Turner*, 39 Ch. D. 456.

(*c*) 1 Doug. 21. And see *Davis* v. *Eyton*, 7 Bing. 154.

right to emblements would be no bar to the mortgagee's recovering in ejectment; it would only give the lessee a right of ingress and egress to take the crops. But now, under the Tenants Compensation Act, 1890 (*d*), a tenant, under a tenancy not binding on the mortgagee, is nevertheless entitled to compensation against the mortgagee for crops, improvements, tillages, &c.

Right to arrears of rent.

A mortgagee is not entitled to arrears of rent which have accrued due up to the time of his taking possession, whether the property was, up to that time, in possession of the mortgagor himself (*e*), or his trustee in bankruptcy (*f*), or any other person claiming under him (*g*). And this rule applies not only to a mortgagee in fee, but also to a mortgagee of a term (*h*), or of a life estate (*i*).

Where a mortgagee moves to discharge a receiver, he is entitled to rents received between the notice of motion and the order thereon giving him possession, for he is regarded as in possession from the date of the notice of motion (*k*).

Current rents not apportioned.

A mortgagee entering into possession is not disentitled by the Apportionment Act, 1870 (*l*), from demanding and receiving current rent becoming payable after entry. But he is not entitled to so-called rents due to the mortgagors for warehousing goods, though recoverable under statute of distraint and sale of the goods (*m*).

Warehousing rents.

Action for mesne profits against lessee.

As to mesne profits, the tenant may continue to pay the rent to the mortgagor so long as he is allowed by the mortgagee to receive it (*n*), provided it is rent due, and not a payment by anticipation on account of future rent (*o*). But if the tenant pay rent to the mortgagor after notice to pay to the mortgagee, he cannot, if compelled to pay it to the mortgagee, recover it from the mortgagor (*p*).

Actual possession of mortgagee necessary.

The mortgagee could not formerly bring an action of trespass for mesne profits against the tenant, or waive the tort and sue

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(*d*) 53 & 54 Vict. c. 57.

(*e*) *Drummond* v. *Duke of St. Albans*, 5 Ves. 438; *Higgins* v. *York Buildings Co.*, 2 Atk. 106.

(*f*) *Exp. Wilson*, 2 V. & B. 252.

(*g*) *Hele* v. *Lord Bexley*, 20 Beav. 127; *Flight* v. *Camac*, 25 L. J. Ch. 654.

(*h*) *Gresley* v. *Adderley*, 1 Swanst. 573.

(*i*) *Coleman* v. *Duke of St. Albans*, 3 Ves. 25.

(*k*) *Preston* v. *Tunbridge Wells Opera House*, (1903) 2 Ch. 323.

(*l*) 33 & 34 Vict. c. 35.

(*m*) *Anderson* v. *Butler's Wharf Co.*, 48 L. J. Ch. 824.

(*n*) *Ante*, p. 693.

(*o*) *De Nicholls* v. *Saunders*, L. R. 5 C. P. 593; *Cook* v. *Guerra*, L. R. 7 C. P. 132.

(*p*) *Ante*, p. 693.

for use and occupation, unless he had been in actual possession of the land, or unless the tenant was estopped from denying the possession by a verdict, or had suffered judgment by default in ejectment (*q*). But since the Judicature Act he can claim mesne profits without having been in actual possession, and can join such claim with a claim for possession (*r*).

Remedy of ejected tenant against mortgagor.

The mortgagor, after disturbance by the mortgagee, will be liable to his tenant in an action for damages on his covenant for quiet enjoyment (*s*); and the mortgagee will also be liable for compensation (*t*); and the lessee's right to sue the mortgagor is not affected by the circumstance of his having obtained from the mortgagee compensation for improvements (*u*).

If the mortgagee refuses to adopt a lease, or agreement for a lease, made without his consent by the mortgagor, whether or not he proceeds to evict the lessee, yet the lease, being a valid demise of the equity of redemption, will entitle the lessee to redeem the mortgage (*x*), and will at all events be binding on the mortgagor, and all persons claiming under him.

Confirmation of leases, &c. by mortgagee.

The mortgagee may elect not to eject the lessee, and may confirm the tenancy, or rather establish a new tenancy upon the same terms (*y*); and any act of the mortgagee demonstrating an approbation of the lease, such as the receipt of or distress for rent, or notice to quit (*z*), or the like, will be evidence of a tenancy, and a demand by the mortgagee or his agent, and payment by the tenant of interest on the mortgage instead of rent, will suffice (*a*).

If the mortgagee encourages the lessee to lay out money on the premises, he will not afterwards be permitted to disavow the tenancy (*b*); but mere inspection by the mortgagee of the improvements will not amount to acceptance of the lessee as his tenant (*c*).

Tenancy from year to year created.

The mortgagee does not, by making the lessee his tenant, set up a lease for the term, but only creates a tenancy from year to

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(*q*) *Turner* v. *Cameron's Coalbrook Steam Co.*, 5 Exch. 932; *Litchfield* v. *Ready*, 5 Exch. 939.

(*r*) *Dunlop* v. *Macedo*, 8 T. L. R. 43.

(*s*) *Costigan* v. *Hastler*, 2 Sch. & L. 160; *Howe* v. *Hunt*, 31 Beav. 420.

(*t*) 53 & 54 Vict. c. 57.

(*u*) *Carpenter* v. *Parker*, 3 C. B. N. S. 206.

(*x*) *Tarn* v. *Turner*, 39 Ch. D. 456, C. A.

(*y*) *Keech* v. *Hall*, 1 Doug. 21.

(*z*) *Smith* v. *Eggington*, L. R. 9 C. P. 145.

(*a*) *Doe* v. *Cadwallader*, 2 B. & Ad. 473; *Doe* v. *Hales*, 7 Bing. 322.

(*b*) *Keech* v. *Hall*, 1 Doug. 21; *Evans* v. *Elliott*, 1 P. & D. 256.

(*c*) *Doe* v. *Hughes*, 11 Jur. 698.

year (*d*). So, if the mortgagee asserts his paramount title by giving to a lessee or tenant notice to pay the rents to him, the lessee of the mortgagor, subsequent to the mortgage, may consider himself as tenant from year to year of the mortgagee, and determine his tenancy with the mortgagor, notwithstanding that he has in the meantime paid rent to the mortgagee pursuant to the notice (*e*).

Distress by mortgagee.

If the tenant should refuse to pay the rents due at the time of the notice, and in the absence of any other circumstances from which a tenancy can be inferred, such notice by the mortgagee is not of itself sufficient to make the lessee his tenant, so as to enable him to distrain or sue for the rent afterwards accruing due under the lease (*f*).

The mortgagee cannot distrain on a tenant of the mortgagor under a lease made after the mortgage, unless the tenant has expressly or impliedly attorned (*g*); and notice by the mortgagee to the tenant of the mortgagor under such a lease does not of itself constitute the relation of tenant to the mortgagee, or entitle the latter to distrain for the subsequent rent (*h*). A subsequent payment of rent will not act by way of relation back to establish a distress for previous rent (*h*): there must be an attornment or other evidence of consent by the tenant (*i*).

New tenancy between mortgagee and tenant of mortgagor.

A new tenancy may be created between the mortgagee and tenant by payment and acceptance of rent, as rent (*k*), such acceptance, apart from the Conveyancing Act, converting the lessee into a tenant from year to year, though not of itself implying that the tenancy is to be upon the terms of the old lease (*l*). But mere notice by the mortgagee to the tenant to pay the rents to him, without attornment or assent on the part of the tenant, is insufficient to create a new tenancy (*m*); and the fact that the tenant remains in possession after such notice does not raise an inference that he has assented to become tenant

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(*d*) *Doe* v. *Bucknell*, 8 C. & P. 566; *Partington* v. *Woodcock*, 5 N. & M. 672.

(*e*) *Corbett* v. *Plowden*, 25 Ch. D. 678, C. A.

(*f*) *Evans* v. *Elliott*, 9 A. & E. 342; *Towerson* v. *Jackson*, (1891) 2 Q. B. 484, C. A.

(*g*) *Evans* v. *Elliott*, *sup.*; *Rogers* v. *Humphreys*, 4 A. & E. 299.

(*h*) *Partington* v. *Woodcock*, 5 N. & M. 672; *Rogers* v. *Humphreys*, *sup.*; *Evans* v. *Elliott*, *sup.*; *Re Ind, Coope & Co.*, (1911) 2 Ch. 223.

(*i*) *Wheeler* v. *Branscombe*, 5 Q. B. 375; *Doe* v. *Thompson*, 9 Q. B. 1037.

(*k*) See *Rogers* v. *Humphreys*, 4 A. & E. 813, per Lord Denman, C.J.

(*l*) *Keith* v. *Gancia*, (1904) 1 Ch. 774.

(*m*) *Evans* v. *Elliott*, 9 A. & E. 342. And see 6 A. & E. 695.

to the mortgagee (*n*). But it would seem that a notice by the mortgagee to pay all future rents to him may be treated by the tenant, as against the mortgagor, as an eviction by title paramount (*o*).

It seems to be open to the tenant to treat the payments made to the mortgagee in consequence of the notice as payments made on the mortgagor's account, and to plead the same accordingly, without denying the mortgagor's title as landlord (*p*).

If the mortgagee recognize the lessee as his own tenant, or as being in lawful possession of the premises at a given time, it is not competent for him to say afterwards that he was at that time a trespasser (*q*).

In *Pope* v. *Biggs* (*r*), the Court of King's Bench decided that the tenant in possession under a demise subsequent to the mortgage was justified in paying the rent to the mortgagee due at the time of the notice and demand made, on the ground that as the mortgagee might have evicted the tenant, and obtained the rents due in an action for mesne profits, the mortgagee must be entitled to receive them without bringing an ejectment.

But in *Evans* v. *Elliott* (*s*) it was decided that a mortgagee cannot, by the mere fact of giving the mortgagor's tenant a notice, cause him to hold of himself, the mortgagee, and that even a subsequent attornment by the tenant to the mortgagee will not have the effect of setting up his title as landlord by relation.

Where a mortgagee gives notice to tenants, but does not take possession, any loss arising to the mortgagor therefrom will fall on the mortgagee (*t*); but if the mortgagee, after he has taken possession, refuses to apply for rent, the mortgagor has no remedy in equity; his only remedy is against the mortgagee on taking the accounts (*u*).

Lease by mortgagor is voidable, not void.

As a tenant cannot dispute his landlord's title, the lease by the mortgagor after the mortgage will be good until the mort-

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(*n*) *Towerson* v. *Jackson*, (1891) 2 Q. B. 484; *Dunlop* v. *Macedo*, 8 T. L. R. 43.

(*o*) 2 Bing. N. S. 538.

(*p*) *Johnson* v. *Jones*, 9 A. & E. 809; though in this case the rent was due before the notice.

(*q*) *Birch* v. *Wright*, 1 T. R. 383; *Doe* v. *Hales*, 7 Bing. 322. And see *Doe* v. *Olley*, 12 A. & E. 481; *Doe* v. *Goodier*, 10 Q. B. 957.

(*r*) 9 B. & C. 245. And see *Johnson* v. *Jones*, 9 A. & E. 809.

(*s*) 9 A. & E. 355.

(*t*) *Heales* v. *McMurray*, 23 Beav. 401.

(*u*) *Salmon* v. *Dean*, 14 Jur. 235, reversed on other points, 3 Mac. & G. 344.

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gagee interferes, until which time the mortgagor may receive the rent to his own use, and may distrain for it (x), even after the mortgagee has given notice to the tenant to pay, but before he has paid; and the tenant would have had no defence (y); the tenant, however, after such notice, is quite justified in giving up the premises to the mortgagee (z). In *Wilton* v. *Dunn* (a), it was held that it was not sufficient for the tenant to show a notice and claim by the mortgagee; he must prove payment; but payment of rent by a tenant to the mortgagee after notice and on compulsion is valid (b).

Nor is the tenancy under the mortgagor affected by an authority from the mortgagor to the mortgagee to receive the rents, though perhaps such a power may be irrevocable and justify all payments made under it while the mortgage debt continues (c).

Estoppel.

After the lessee has been compelled to pay the mortgagee, he still, in defending himself against the mortgagor, must admit the latter's title, and show that it has determined (d); or if the payment were with the mortgagor's consent, the plea might have been *rien in arrière* (e); but such payment of rents due at the time of the notice must, in an action by the mortgagor, have been and still must be specially pleaded (f). So if the rent has become due, and is not paid to mortgagee or mortgagor, any binding agreement between them for payment of rent to the former must have been, and must be still, specially pleaded by the tenant (g).

But though the tenant will thus be allowed all payments to the mortgagee made under compulsion, or with the assent of the mortgagor, he could not, in an action brought against him by the latter, plead what amounted to *nil habuit in tenementis* (h),

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(x) *Trent* v. *Hunt*, 9 Exch. 14.

(y) Per Williams, J., in *Carpenter* v. *Parker*, 3 C. B. N. S. 206.

(z) *Carpenter* v. *Parker*, 3 C. B. N. S. 206.

(a) 17 Q. B. 294. See *Hickman* v. *Machin*, 4 H. & N. 716; *Salmon* v. *Dean*, 3 Mac. & G. 344.

(b) *Johnson* v. *Jones*, 9 A. & E. 809. See *Brown* v. *Storey*, 1 Man. & Gr. 117; *Underhay* v. *Read*, 20 Q. B. D. 209, C. A.; *Towerson* v. *Jackson*, (1891) 2 Q. B. 484, C. A.

(c) *Wheeler* v. *Branscombe*, 5 Q. B. 375.

(d) *Alchorne* v. *Gomme*, 2 Bing. 54; *Doe* v. *Edwards*, 5 B. & Ad. 1065; *Taylor* v. *Zamira*, 6 Taunt. 524; *Johnson* v. *Jones*, *sup.*

(e) *Dyer* v. *Bowley*, 2 Bing. 94; *Wheeler* v. *Branscombe*, 5 Q. B. 375, 377.

(f) *Waddilove* v. *Barnet*, 2 Bing. N. C. 538.

(g) *Wheeler* v. *Branscombe*, *sup.*

(h) *Alchorne* v. *Gomme*, 2 Bing. 54. And see *Johnson* v. *Jones*, 2 P. & D. 651.

though he might show that the mortgagor's interest had determined by eviction by the mortgagee (*i*).

Of course a lessee claiming under the mortgagor subsequently to the mortgage may, in answer to an action by the mortgagee, show eviction by title paramount; or, if the lease be prior in date to the mortgage, it would seem that he may either make the same defence of eviction by title paramount, or without showing any eviction, plead that by reason of the paramount title the mortgagor could not transmit any legal title to the mortgagee (*k*); and notice given by the person having such paramount title to the tenant, to pay the rent to him, is, it seems, evidence to go to a jury of the fact of eviction (*l*). And if, prior to 3 & 4 Will. IV. c. 74, which abolished fines and recoveries, the mortgagor, being tenant in tail, had mortgaged his estate, and afterwards levied a fine, or suffered a recovery to other uses, it would, nevertheless, have let in the mortgage (*m*); and since the passing of that statute, the mortgage of a tenant in tail will be also let in by his deed duly inrolled in pursuance of the statute, except as against a *bonâ fide* purchaser without express notice (*n*).

A tenant is not estopped from disputing the title of an unadmitted mortgagee of copyholds, because estoppel will not operate upon an equitable estate (*o*).

Where a lease was made by the mortgagor to which the mortgagee was not a party, but in which the mortgage was recited, and the mortgagor, after assignment, brought an action on the covenant for rent, it was held that the covenants were in gross, and that it might be well averred in the declaration that the plaintiff had no reversion at the time of the demise, and that a plea "that the reversion was in the plaintiffs at the time of the demise, and that before breach the plaintiffs had assigned it to a third person," was bad; as whatever might be the law otherwise, there was no estoppel in the present case, by reason of the disclosure of the facts on the face of the lease (*p*).

(*i*) *Doe* v. *Barton*, 11 A. & E. 307.

(*k*) *Doe* v. *Barton*, 11 A. & E. 307. This latter ground, although taken in the judgment alone as the ground of defence for the particular defendant (Barton), is questionable, since the case of *Gouldsworth* v. *Knights*, 11 M. & W. 337.

(*l*) *Doe* v. *Barton*, *sup.*

(*m*) See *ante*, p. 378.

(*n*) See 3 & 4 Will. IV. c. 74, s. 38.

(*o*) *Rayson* v. *Adcock*, 9 Jur. N. S. 800; *Doe* v. *Webber*, 3 Bing. N. C. 922.

(*p*) *Pargeter* v. *Harris*, 7 Q. B. 708; *The Mayor and Burgesses of Poole* v. *Whitt*, 15 M. & W. 571.

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Whether assignee of mortgagor can sue tenants.

Whether indeed, in ordinary cases, where there is nothing on the face of the lease to prevent the estoppel, the assignee of a lessor, who had only an equity of redemption, or had no interest in the premises demised, can maintain an action on the covenant or distrain against the lessee, or whether the estoppel ceases as between them, is a point on which the cases are not agreed. In the case of *Gouldsworth* v. *Knights* (*q*), the Court of Exchequer held that the assignee had a good title by estoppel against the tenant, and might distrain for the rent, though the case was decided on a different point. But this opinion of the Court is not easily reconcileable with the doctrine laid down in other cases (*r*).

It seems, however, to be settled, that if the reversion by estoppel in the lessor is afterwards fed by a conveyance of the legal estate, the lease thereupon becomes a legal lease, and an assignee of the lessor is an assignee of the reversion on the lease within 32 Hen. VIII. c. 34 (*s*). Although this doctrine seems to be in direct opposition to the earlier case of *Whitton* v. *Peacock* (*t*), where, on the like principle as that on which the Court of King's Bench decided the first point in *Webb* v. *Russell* (*u*) against the plaintiff, viz., the alteration of the estate in reversion, the Court of Common Pleas decided, that if a lessor having only title by estoppel makes a demise of copyholds, and subsequently takes a surrender of the legal estate, and is admitted, his assignee of the reversion cannot sue the lessee on the covenants in the lease (*x*).

It is provided by statute (*y*), that when the reversion expectant on a lease shall be surrendered or merged, the estate, which shall for the time being confer as against the tenant under the same lease the next vested right to the same hereditaments, shall, to the extent of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease (*z*).

(*q*) 11 M. & W. 337.

(*r*) 2 Bing. N. C. 411; *Carvick* v. *Blagrave*, 1 B. & B. 531; *Doe* v. *Barton*, 11 A. & E. 307. And see the judgment in *Pargeter* v. *Harris*, 7 Q. B. 708, and in *Webb* v. *Austin*, 8 Sc. N. R. 419.

(*s*) *Webb* v. *Austin*, *sup.*; *Sturgeon* v. *Wingfield*, 15 M. & W. 224. Cf. *Muller* v. *Trafford*, (1901) 1 Ch. 54.

(*t*) 2 Bing. N. C. 411.

(*u*) 3 T. R. 393.

(*x*) *Whitton* v. *Peacock*, 2 Bing. N. C. 411.

(*y*) 8 & 9 Vict. c. 106, s. 9.

(*z*) See *Capital and Counties Bank* v. *Rhodes*, (1903) 1 Ch. 631, C. A.

Right of and against assignee of mortgagor.

Generally the assignee of the mortgagor can sue the tenant, though the lease is subsequent to the mortgage, as the lease operates by way of estoppel (*a*); but where the lease shows the mortgage there is no estoppel (*b*). And as against the assignee of the mortgagor, the tenant may show that the assignee could not have a derivative title from the mortgagor, and he would not be concluded from doing so by payment of rent to the assignee under a mistake of facts (*c*).

Where the assignee of the mortgagor acquires the legal estate from the mortgagee, who was not privy to or estopped by the lease, the assignee will not be bound by it (*d*).

Underlease.

An underlease by the mortgagor passes no legal interest (*e*).

Lease of house and furniture.

Where the mortgagor lets the premises furnished, the furniture not forming part of the mortgage, the mortgagee can only recover an apportioned rent (*f*).

Powers of leasing.

iv.—Leases by Mortgagors under Express Powers.—As formerly neither the mortgagor nor the mortgagee alone could make a lease which would be binding on the other (*g*), it was often thought advisable to enable the mortgagor to grant leases independently of the mortgagee by giving him a power of leasing (operating by way of appointment); and in the case of a lease operating under such a power, it was not material with whom the lessee's covenants were entered into, as the law annexed the benefit of the covenants to the legal reversion (*h*).

According to this view of the legal doctrine, it was needless to impose upon the mortgagor any stringent conditions as to the form of the lease, as if the lease operated under the power, the benefit of the covenants and condition of re-entry as well as the rent were *ipso facto* annexed to the reversion, and therefore available by the mortgagee, his heirs and assigns; and if the lease did not operate under the power it merely took effect by estoppel as between the lessor and lessee, and did not bind the

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(*a*) *Cuthbertson* v. *Irving*, 6 H. & N. 135, Exch. Ch.

(*b*) *Saunders* v. *Merryweather*, 3 H. & C. 902.

(*c*) *Doe* v. *Barton*, 11 A. & E. 307.

(*d*) *Doe* v. *Thompson*, 9 Q. B. 1037; *Doe* v. *Edwards and Others*, 5 B. & Ad. 1065.

(*e*) *Doe* v. *Ongley*, 20 L. J. C. P. 26.

(*f*) *Dubutofte* v. *Curteene*, Cro. Jac. 453; *Salmon* v. *Mathews*, 8 M. & W. 827; *Hoare* v. *Hove, &c.*, 56 S. J. 686.

(*g*) *Sup.* p. 696.

(*h*) *Greenaway* v. *Hart*, 14 C. B. 340.

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mortgagee or those claiming under him. The lease was, according to the usual practice, framed so that it might be unmistakeably an exercise of the power (*i*).

Leasing powers of mortgagors and mortgagees in possession since 1st January, 1882.

v.—Leases by Mortgagors under Statutory Powers.—As regards leases made by a mortgagor where the mortgage was made on or after the 1st January, 1882, the Conveyancing Act, 1881 (*k*), enacts as follows:—

Sect. 18.—"(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

"(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

"(3.) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

"(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

"(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

"(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

"(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

"(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall in favour of the lessee and all persons deriving title under him, be sufficient evidence.

"(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect, within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute within that time, on the land leased, an improvement for or in connection with building purposes.

"(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may

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(*i*) *Yellowly* v. *Gower*, 11 Exch. 274.

(*k*) 44 & 45 Vict. c. 41.

be made payable for the first five years, or any less part of the term.

"(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

"(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

"(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

"(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

"(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

"(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

"(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting."

Effect of sect. 18.

This section removes, in cases to which it applies, the disability which formerly prevented mortgagors in possession from granting leases and entering into and enforcing contracts for leases without the consent of their mortgagees.

The conditions annexed to an exercise of this statutory power must be strictly observed, as otherwise the lease will be void, as under the old law, as against the mortgagee (*l*), and will only operate as between the mortgagor and the lessee by estoppel (*m*).

(*l*) See *Yellowly* v. *Gower*, 11 Exch. 274.

(*m*) See *ante*, p. 704.

The expression "mortgagor" does not include an incumbrancer deriving title under the original mortgagor (*n*).

Definition of land.

Land, as defined for the purposes of this Act, unless a contrary intention appears, includes land of any tenure and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share of land (*o*).

Option to renew or determine.

A lease by a mortgagor under this section is not rendered invalid by the fact that it contains an option to renew, or because it contains an option to determine the lease at definite periods during the term (*p*).

Other land included.

But a lease which includes property other than that comprised in the mortgage at one inclusive rent does not comply with the section and is invalid as against the mortgagee, and a subsequent apportionment of the rent will not validate the lease, nor can the Court grant relief under the Leases Act, 1849 (*q*).

Lease of easements.

A lease by a mortgagor under this section may apparently confer, so as to bind the mortgagees, rights of light or other easements over adjoining land (*r*).

A lease may also be made, under the section, of an incorporeal hereditament (as, for instance, a right of shooting) if severed before the granting of the lease; and, *semble*, if not so severed (*s*).

Leases by limited owner of mortgaged lands.

Although the above definition of land does not extend to "any estate or interest in land," it is conceived that tenants for life and other limited owners who have mortgaged their interests may, without the consent of their mortgagees, grant leases of the settled lands under this section. A tenant for life may, however, grant leases under the Settled Land Act, 1882, s. 50, without the consent of the mortgagee, unless the mortgagee is actually in possession (*t*).

Mortgagee enforcing covenants.

Where a lease is granted by a mortgagor in possession under the Conveyancing Act, the mortgagee on giving notice to the tenant and going into possession is entitled by virtue of the Act to enforce the covenants in the lease in the same manner as if he had been a party to it (*u*), and to enforce a forfeiture

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(*n*) 1 & 2 Geo. V. c. 37, s. 3 (10).

(*o*) 44 & 45 Vict. c. 41, s. 2 (ii).

(*p*) *King* v. *Bird*, (1909) 1 K. B. 837.

(*q*) *Ibid.*

(*r*) *Wilson* v. *Queen's Club*, (1891) 3 Ch. 522.

(*s*) *Brown* v. *Peto*, (1900) 2 Q. B. 653, C. A.

(*t*) *Ante*, p. 400.

(*u*) *Municipal Permanent Invest-*

or condition already broken, if such condition has not been waived or released (*x*).

Mortgagee bound by covenants.

A mortgagee is not bound by any agreement collateral to the lease made between the mortgagor and his lessee (*y*).

Where a lease is granted by a first mortgagee and the mortgagor, the lessee must take by the better title. The better title under the Act is given by the mortgagor in possession. Therefore the lessee is bound by the restrictive covenants of the mortgagor in a second mortgage, and cannot set up the paramount title of the first mortgagee (*z*).

Distress.

If a receiver has been appointed by the mortgagee, the mortgagor cannot distrain for rent, even after the receiver has refused to do so (*a*).

Sub-sect. 2. Leases by mortgagees in possession.

Sub-sect. 2 of sect. 18 of the Act of 1881 empowers mortgagees in possession to grant leases of the mortgaged lands in accordance with the provisions contained in the following subsections. This question will be considered later (*b*).

Sub-sect. 3. No power to grant mining leases.

Mortgagors are not empowered under sect. 18 to grant mining leases of the mortgaged land, inasmuch as such leases involve the abstraction of *corpus* of the property so as prejudicially to affect the security. But the provisions of the section, with such modification as may be necessary, may be extended by the terms of the mortgage deed so as to enable a mortgagor to grant mining leases (*c*). It will be observed that mining leases are not excepted from the statutory power of leasing given by the Settled Land Act, 1882, to limited owners of settled lands which are in mortgage.

Sub-sect. 6. Best rent to be reserved.

Sect. 18 requires the lease to reserve the best rent that can reasonably be obtained. In estimating what is the best rent in each case, the particular circumstances must be regarded as a whole; and if the lease was granted in good faith and between independent contracting parties, the Court would not interfere unless satisfied that the inadequacy was substantial (*d*).

Sub-sect. 7.

By virtue of sects. 10, 11 of the Conveyancing Act, when a

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ment Building Soc. v. *Smith*, 22 Q. B. D. 70, C. A.

(*x*) 1 & 2 Geo. V. c. 37, s. 2, *inf.*

(*y*) *Ibid.*

(*z*) *John Brothers Abergarw Brewery* v. *Holmes*, (1900) 1 Ch. 188.

(*a*) *Woolston* v. *Ross*, (1900) 1 Ch. 788.

(*b*) See *post*, Chap. XLII., Sect. II. (ii).

(*c*) See Conv. Act, 1881, s. 18, sub-ss. (13) and (14), *sup.*

(*d*) *Duchess of Sutherland* v. *Duke of Sutherland*, (1893) 3 Ch. 169, 193; *Renner* v. *Tolley*, W. N. (1893) 90.

Covenants and condition of re-entry.

mortgagor in possession has granted a lease under sect. 18, the mortgagee upon giving notice of his intention to take possession becomes the reversioner and is entitled to the benefit of the covenants and conditions in the lease, and is subject to the obligation of the covenants entered into by the mortgagor (*e*). And by the Conveyancing Act, 1911 (*f*), the mortgagee may take advantage of any condition of re-entry or forfeiture which became enforceable before he took possession, provided such condition had not been waived or released.

Sub-sect. 8. Delivery of counterpart.

The mortgagor must deliver to the mortgagee a counterpart within one month after making the lease (*g*). If the mortgage is of an undivided share of land, and the mortgagor concurs with the other co-owners in granting a lease under this section, he must either obtain their consent to the delivery of the counterpart to the mortgagee or he must obtain a duplicate counterpart from the lessee. If a counterpart has been executed by the lessee, the non-delivery thereof to the mortgagee will not prevent the lease from being binding on the mortgagee in favour of the lessee, who is not concerned to see that the counterpart is delivered to the mortgagee (*g*); but the lessee and those claiming under him will be protected by production of the lease executed by the lessor. The omission to deliver the counterpart would not invalidate the lease, but it would make the statutory power of sale immediately exerciseable (*h*).

Sub-sect. 9. Building leases.

For the purposes of the Act, "building purposes include the erecting and the improving of, and the adding to and repairing of, buildings; and a building lease is a lease for building purposes or purposes connected therewith" (*i*). Sect. 18, sub-sect. 9, of the Act, by enacting that building leases shall be made for the considerations therein mentioned (which are in effect considerations that the lessee shall carry out building purposes), seems impliedly to allow that such considerations may be regarded in fixing the best rent. If it is desired that the mortgagor shall not be able to grant under his statutory power a valid lease, reserving for five years a comparatively low or even nominal rent in consideration of the lessee having carried out, or undertaking to carry out, building operations involving

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(*e*) *Municipal Soc.* v. *Smith*, 22 Q. B. D. 70; *Wilson* v. *Queen's Club*, (1891) 3 Ch. 522.

(*f*) 1 & 2 Geo. V. c. 37, s. 2.

(*g*) Conv. Act, 1881, s. 18, sub-s. 11.

(*h*) *Ibid.* s. 20; *Public Trustee* v. *Lawrence*, (1912) 1 Ch. 789.

(*i*) *Ibid.* s. 2 (x).

large capital expenditure on his part, a contrary intention must be expressed in the mortgage deed under sub-sect. 13.

It would seem, by analogy, that a past voluntary expenditure, that is, money laid out by the lessee without any reference to the lease, cannot be treated as a consideration under sub-sect. 9 (*k*).

Repairing lease.

The consideration of "having repaired buildings" will not be satisfied by part repairs effected by the lessee without any binding obligation or contract on his part (*k*).

Sub-sect. 13. Contrary intention.

It is not unusual in practice to insert in mortgages a proviso excluding or modifying the provisions of this section, on the ground that the powers thereby conferred upon mortgagors are unduly extensive.

Where it is intended to exclude the operation of this section, this should be done in express terms, and not merely by giving different powers of leasing to the mortgagor, which might be construed as collateral to and not in substitution of the statutory powers.

If the operation of the section is simply negatived, the concurrence of the mortgagee in leases will be required, as was the case before the passing of the Act.

Execution of mortgage deed by mortgagee to entitle him to benefit of contrary intention.

Sub-sect. 13 requires that the contrary intention should be expressed not merely in the mortgage deed, but "by the mortgagor and the mortgagee in the mortgage deed, or otherwise in writing." But, notwithstanding these words, it does not seem necessary, in order to express a contrary intention, that the mortgagee should execute the mortgage deed. The mere acceptance by him of the security binds him. No doubt the execution of the deed by the mortgagor alone would bind him, as between himself and the mortgagee, not to grant such a lease, and the mortgagee, although he had not himself executed the deed, might restrain the mortgagor from doing so; but it seems doubtful whether, after the lease had been granted, the mortgagee, unless he had executed the mortgage deed, could treat the lease as void as against a person who was not a party to that deed and had taken his lease *bonâ fide* and without notice that the mortgagor's statutory powers of leasing had been therein expressed to be excluded.

Sub-sect. 15. Leases of copyholds.

The effect of sub-sect. 15 is to render the powers of leasing

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(*k*) *Re Chawner's Settled Estates*, (1892) 2 Ch. 192.

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conferred by this section inapplicable, except by licence of the lord, to copyholds in manors where there is no custom to lease without such licence.

Sub-sect. 16. Mortgage after the Act under agreement.

The powers of leasing given by sect. 18 apply to mortgages made after, but in pursuance of agreements made before, the commencement of this Act. So where an agreement for a mortgage made before the commencement of the Act provided that a mortgage should be executed containing a power of sale and all other "usual clauses," it was held that the mortgagor was not entitled to have the operation of this section excluded (*l*).

Sub-sect. 17. Parol leases and tenancies.

The words "so far as circumstances admit" apparently render inapplicable to parol agreements sub-sect. 7, as to covenant for payment of rent and condition of re-entry, and sub-sect. 8, as to delivery of a counterpart, and also permit an agreement to pay rent to be substituted for a covenant in agreements in writing not under seal for leasing or letting.

vi.—Surrenders of Leases.—Formerly a mortgagor who had granted a lease under sect. 18 had no power to accept a surrender without the concurrence of the mortgagee (*m*). But this has been altered by the Conveyancing Act, 1911, s. 3, which provides as follows:—

Powers (with a view to the grant of an authorized lease) for mortgagor and mortgagee in possession to accept surrenders of leases.

Sect. 3.—"(1.) For the purpose only of enabling a lease, authorised under sect. 18 of the Act of 1881, as varied by this section, or under any agreement made pursuant to sect. 18 aforesaid, or by the mortgage deed (in this section referred to as an authorised lease) to be granted, a mortgagor of land while in possession shall, in like manner as if the legal estate were vested in him and as against every incumbrancer, have, by virtue of this Act, power to accept from time to time a surrender of any lease of the mortgaged land or any part thereof comprised in the lease, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them, and, on a surrender of part only of the land or mines and minerals leased, the rent may be apportioned.

"(2.) For the same purpose, a mortgagee of land while in possession shall, in like manner, and as against all prior or other incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to accept from time to time any such surrender as aforesaid.

(*l*) *Re Nugent and Riley's Contract*, 49 L. T. 132. See *Farmer* v. *Pitt*, (1902) 1 Ch. 954.

(*m*) *Robbins* v. *Whyte*, (1906) 1 K. B. 125.

"(3.) On a surrender of part only of the land or mines and minerals leased, the original lease may be varied, provided that the lease when varied would have been valid as an authorised lease if granted by the person accepting the surrender; and, on a surrender and the making of a new or other lease, whether for the same or for any extended or other term, and whether subject or not to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may, subject to the provisions of this section, be taken into account in the determination of the amount of the rent to be reserved, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

"(4.) Nothing in this section shall, where any consideration (except an agreement to accept an authorised lease) for the surrender is given by or on behalf of the lessee to or on behalf of the person accepting the surrender, authorise a surrender to a mortgagor without the consent of the incumbrancers, or authorise a surrender to a second or subsequent incumbrancer without the consent of any prior incumbrancer.

"(5.) No surrender shall, by virtue of this section, be rendered valid unless:—

(a) An authorised lease is granted of the whole of the land or mines and minerals comprised in the surrender to take effect in possession immediately or within one month after the date of the surrender; and

(b) The term certain or interest granted by the new lease is not less in duration than the unexpired term or interest which would have been subsisting under the original lease if that lease had not been surrendered; and

(c) Where the whole of the land, mines and minerals originally leased has been surrendered, the rent reserved by the new lease is not less than the rent which would have been payable under the original lease if it had not been surrendered; or where part only of the land or mines and minerals has been surrendered, the aggregate rents respectively remaining payable or reserved under the original lease and new lease are not less than the rent which would have been payable under the original lease if no partial surrender had been accepted.

"(6.) A contract to make or accept a surrender under this section may be enforced by or against every person on whom the surrender, if completed, would be binding.

"(7) Sub-sects. (13) (16) and (17) of sect. 18 of the Act of 1881 shall have effect as if they were re-enacted in this section, and references to the commencement of that Act shall, for the purposes of this section, be read as references to the commencement of this Act.

"(8.) Nothing in this section shall prevent the mortgage deed from reserving to or conferring on the mortgagor or mortgagee, or both, any further or other powers relating to the surrender of leases; and any further or other powers so conferred or reserved shall be exercisable, as far as may be, as if they were conferred

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by this Act, and with the like results, unless a contrary intention is expressed in the mortgage deed.

"(9.) Nothing in this section shall operate to enable a mortgagor or mortgagee to accept a surrender which could not have been accepted by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

"(10.) For the purposes of this section, and of sub-sect. (1) of sect. 18 of the Act of 1881, the expression 'mortgagor' does not include an incumbrancer deriving title under the original mortgagor.

"(11.) The powers of leasing and of accepting surrenders respectively conferred by sect. 18 of the Act of 1881, and this section shall, after a receiver of the income of the mortgaged property or any part thereof has been appointed by a mortgagee, under that Act, and so long as the receiver acts, be exerciseable by such mortgagee instead of by the mortgagor, as respects any land affected by the receivership, in like manner as if such mortgagee were in possession of the land."

CHAPTER XXXVIII.

REDEMPTION.

SECTION I.

THE RIGHT TO REDEEM GENERALLY.

Right to redeem inherent to mortgage.

i.—Who are entitled to redeem.—It has been seen that the right of redemption is inherent in and inseparable from a mortgage transaction, whether, as is usually the case, the right is vested in the mortgagor by an express proviso to that effect contained in the mortgage deed, or whether it is to be reasonably inferred from the circumstances of the transaction that the instrument was intended to operate by way of security, and not as an absolute conveyance (*a*). This inherent right is, however, enforceable only by the persons, subject to the conditions, and in the manner hereafter stated.

No redemption where conditional sale.

If the transaction be by way of sale, but reserving to the vendor a right of repurchase within a limited time or in a certain event, it is not a mortgage, and if the condition of repurchase is not strictly complied with, the grantee's title will become absolute so as to deprive the grantor of any right to recover the property (*b*).

Title to redeem must be shown.

It is a general principle that no person shall be entitled to redeem but he who can show a good right to redeem; for the mortgagee is entitled to hold the property against all persons who cannot clearly establish a paramount title (*c*). So where a person claiming under the heir general sought to redeem a mortgage on the fee, and the mortgagee by his answer set up a deed of entail entitling another person to the equity of redemption, it was held that the plaintiff could not be admitted to redeem even at his own peril (*d*).

(*a*) See *ante*, p. 11.

(*b*) *Perry* v. *Meadowcroft*, 4 Beav. 202; *Alderson* v. *White*, 2 De G. & J. 97. As to conditional sales, see *ante*, p. 23.

(*c*) 2 Eq. Ca. Abr. 599. See *Tyson* v. *Cox*, T. & R. 395.

(*d*) *Lomax* v. *Bird*, 1 Vern. 182.

Persons entitled to redeem.

As a general rule, the mortgagor and all persons having any interest in the equity of redemption are entitled to redeem. And whether a person is entitled to redeem will be decided by the Court on originating summons without requiring the mortgagor to offer to redeem (*e*).

Mortgagor of renewable leaseholds.

It has been seen that if the mortgage is of renewable leaseholds, and the mortgagee obtains a renewal, the mortgagor will be entitled to the benefit of the new term, and will have the right to redeem and enjoy the term free from the mortgage (*f*).

One of several co-mortgagors may redeem;

One of several joint tenants or tenants in common of the equity of redemption is entitled to redeem subject to accounts as between himself and his co-owners (*g*).

but must redeem whole.

A co-mortgagor is, however, not entitled or compellable to redeem his part only of the mortgaged property, but must redeem the whole, subject, as between himself and his co-mortgagors, to his right of contribution in respect of the amount paid by him to redeem the mortgage and to the rights of all other persons interested in the equity of redemption (*h*).

Two estates subject to same mortgage must be redeemed together.

So, also, if two estates are comprised in the same mortgage, the owner of the equity of redemption of one of the estates cannot claim or be compelled to redeem that one apart from the other, his right being to redeem the whole property comprised in the mortgage, subject to the equities of other persons interested (*i*).

A mortgagor who has absolutely assigned the equity of redemption cannot bring an action for redemption (*k*).

Assignee of equity of redemption.

The assignee of the equity of redemption may also redeem, although the equity has been abandoned for a considerable time. Of this an instance frequently referred to is to be found in a case before Lord Hardwicke (*l*), in which a person who is there styled a prowling assignee, bought in, for a very inconsiderable sum, an equity of redemption which had been abandoned for fifteen years. The Court decreed a redemption on terms, namely, that on taking the account he should be allowed to surcharge and falsify only, and that the interest on the mort-

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(*e*) *Nobbs* v. *Law Reversionary Interest Soc.*, (1896) 2 Ch. 830.

(*f*) *Ante*, p. 171.

(*g*) *Wynne* v. *Styan*, 2 Ph. 306; *Waugh* v. *Land*, G. Coop. 130; *Wicks* v. *Scrivens*, 1 J. & H. 215; *Pearce* v. *Morris*, L. R. 5 Ch. 227.

(*h*) *Cholmondeley* v. *Clinton*, 2 J. & W. 134. See *Palk* v. *Clinton*, 12 Ves. 48, 49.

(*i*) *Hall* v. *Heward*, 32 Ch. D. 430, C. A.

(*k*) *Kinnaird* v. *Trollope*, 39 Ch. D. 636.

(*l*) *Anon.*, 3 Atk. 314.

gage should be calculated at 5 per cent. But the assignee of the mortgagor *pendente lite*, after action for redemption brought by the mortgagor, is bound by a decree for foreclosure, in his absence (*m*); and after foreclosure and decree, must pay the costs of revivor (*n*). If the assignee purchase the equity of redemption without communicating with the mortgagee, whose mortgage turns out to have been executed by the fraud of the mortgagor, the assignee will be cast (*o*).

Contractor for purchase.

A contractor for the purchase of the equity of redemption is not entitled to redeem until he has accepted the title so as to be in a position to call for a conveyance (*p*).

Voluntary conveyance.

Although a voluntary conveyance was under 27 Eliz. c. 4, fraudulent and void against a mortgagee who was *pro tanto* a purchaser, nevertheless the party claiming under the deed was entitled to redeem (*q*), and *à fortiori* he is now so entitled since the Voluntary Conveyances Act, 1893.

Tenant.

It has been said that a tenant may redeem or procure one to redeem for him (*r*). So it has been held that a tenant for years in occupation under an agreement for a lease made prior to 1882 by a mortgagor, without the consent of his mortgagee, was entitled to redeem, the mortgagee having refused to adopt the agreement (*s*).

Puisne mortgagees.

Subsequent mortgagees may redeem (*t*); but they must make the mortgagor or his heir party to the action (*u*); and if the first incumbrancer be not in possession, they must pay him all the arrears of interest (*x*). If the first mortgagee does not appear at the hearing, the subsequent mortgagee will be allowed to make the decree absolute against him (*y*).

A second mortgagee of part of the property comprised in the first mortgage is entitled, on paying off the first mortgagee, to have a conveyance of the whole property comprised in the first mortgage (*z*).

(*m*) *Wood* v. *Surr*, 19 Beav. 551.

(*n*) *James* v. *Harding*, 24 L. J. Ch. 749.

(*o*) *Vorley* v. *Cooke*, 1 Giff. 230.

(*p*) *Tasker* v. *Small*, 3 My. & Cr. 69; *Pearce* v. *Morris*, L. R. 5 Ch. 227, 231. See also *Tarn* v. *Turner*, 39 Ch. D. 456, 465, C. A.

(*q*) *Rand* v. *Cartwright*, 1 Ch. Ca. 59; *Howard* v. *Harris*, 1 Vern. 193; *Barthrop* v. *West*, 2 Rep. in Ch. 62.

(*r*) *Keech* v. *Hall*, 1 Doug. 21.

(*s*) *Tarn* v. *Turner*, 39 Ch. D. 456, C. A.

(*t*) *Fell* v. *Brown*, 2 Bro. C. C. 276. See 4 & 5 Will. III. c. 16.

(*u*) *Farmer* v. *Curtis*, 2 Sim. 466.

(*x*) *Aston* v. *Aston*, 1 Ves. Sen. 264, 268.

(*y*) *Cottingham* v. *Lord Shrewsbury*, 5 Sim. 395.

(*z*) *Flint* v. *Howard*, (1893) 2 Ch. 54, C. A.

First mortgagee refusing payment.

But a first mortgagee ought, without a judicial proceeding, to accept payment from a second mortgagee, although he has not the concurrence of the mortgagor; and the refusal of the first mortgagee to do so, on tender after notice, debarred him of his right to the costs of the foreclosure suit, though he might, perhaps, in strictness have objected to assign the debt (*a*).

After act of bankruptcy.

A secured creditor or pledgee is not entitled to receive payment of his debt from his debtor after notice of an act of bankruptcy, and therefore the debtor cannot require him to give up his securities on payment of the amount due (*b*).

Trustee of bankrupt.

The trustee of a bankrupt may redeem; but his right to redeem is confined to cases where the creditor has proved either for the purpose of voting or for the purpose of ranking for dividend. Unless the creditor has proved the trustee cannot redeem, and therefore he has no right to redeem a petitioning creditor at the value assessed by him in his petition (*c*). If the trustee does not redeem within six months after notice he will lose his right to do so, and the equity of redemption will vest in the creditor (*d*). It is, moreover, too late for the trustee to redeem after a judgment for foreclosure against a bankrupt mortgagor (*e*).

Judgment creditors.

It was well settled under the old law that a creditor who had obtained a judgment against his debtor might redeem a mortgage of freeholds, without taking out execution (*f*), by virtue of his so-called general lien on the land (*g*); but the rule was different as to mortgaged leaseholds, in which case execution must first have been issued (*h*). Since the statute 27 & 28 Vict. c. 112, it was only by issuing legal or equitable execution that creditors could obtain any charge or lien upon the land of their debtor (*i*); and therefore creditors who had actually issued execution were entitled to institute proceedings for redemption (*k*); and now under the Land Charges Act, 1900, a judg-

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(*a*) *Smith* v. *Green*, 1 Coll. 555; *Pearce* v. *Morris*, L. R. 5 Ch. 230.

(*b*) *Ponsford & Co.* v. *Union of London and Smiths Bank*, (1906) 2 Ch. 444, overruling *Re Lawford and Lawrence*, (1902) 2 K. B. 445.

(*c*) *Re Vautin, Exp. Saffery*, (1899) 2 Q. B. 549; *Re Button, Exp. Voss*, (1905) 1 K. B. 602.

(*d*) Bankruptcy Act, 1883, 2nd Schedule, r. 12.

(*e*) *Sanguinetti* v. *Stuckey's Bank* (No. 2), (1896) 1 Ch. 502.

(*f*) *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538; *Tunstall* v. *Trappes*, 3 Sim. 286, 300.

(*g*) *Stonehewer* v. *Thompson*, 2 Atk. 440.

(*h*) *Shirley* v. *Watts*, 3 Atk. 200; *Angell* v. *Draper*, 1 Vern. 399.

(*i*) 27 & 28 Vict. c. 112, s. 1, now repealed by 63 & 64 Vict. c. 26.

(*k*) *Champneys* v. *Burland*, 23 L. T. 584.

ment does not operate as a charge on land, or on any interest in land, until a writ or order for the purpose of enforcing it is duly registered (*l*). It would seem, therefore, that such registration is necessary before a judgment creditor can institute proceedings for redemption, though in one case it has been held that a judgment creditor, who had filed a bill to redeem against the debtor and his mortgagees without having first obtained execution, was entitled to the ordinary redemption decree (*m*).

If a judgment stand between two mortgages, the judgment creditor, in a suit to redeem the first mortgage, need not make the subsequent mortgagee a party to his action in order to postpone him (*n*).

Plaintiff in creditor's suit.

The plaintiff in a creditor's suit may, after a decree for sale of the real estate, bring a supplementary action for redemption against the mortgagee in order to carry out the sale (*o*).

Crown, &c.

The Crown, or its grantee, might have redeemed on forfeiture of the equity of redemption (*p*), and now the administrators or interim curators of the estate of the felon, under 33 & 34 Vict. c. 23, may do so (*q*).

Lord of manor.

So the lord, claiming the reversion by escheat, may redeem a mortgage term (*r*).

Surety.

A surety to a mortgage is entitled to redeem (*s*) by reason of his right to pay off the debt, and to avail himself of all the remedies of the creditor (*t*); but a surety for part of a debt is not entitled to the benefit of a mortgage given by the debtor to the creditor at a different time for another part of the same debt, and therefore is not entitled to redeem such mortgage (*u*).

Husband and wife.

Where a married woman mortgages her separate estate with the concurrence of her husband, the presumption is that the money was raised for his benefit, and, in the absence of rebutting evidence, the wife is regarded as a surety, with all rights incident to that relation, and will therefore be entitled to redeem (*x*). And this is so even where by a prior deed the wife

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(*l*) 63 & 64 Vict. c. 26, s. 2.

(*m*) *Beckett* v. *Buckley*, L. R. 17 Eq. 435. See *Hatton* v. *Haywood*, L. R. 9 Ch. 229; *Wells* v. *Kilpin*, L. R. 18 Eq. 298.

(*n*) *Shepherd* v. *Gwinnet*, 3 Swanst. 151.

(*o*) *Christian* v. *Field*, 2 Ha. 177.

(*p*) *Att.-Gen.* v. *Crofts*, 4 Bro. P. C. 136; *Lovell's Case*, 1 Salk. 85.

(*q*) See *ante*, p. 665.

(*r*) *Downe* v. *Morris*, 3 Ha. 394. See *Beale* v. *Symonds*, 16 Beav. 406.

(*s*) *Green* v. *Wynn*, L. R. 4 Ch. 204.

(*t*) See as to sureties to mortgages generally, *ante*, Chap. IX.

(*u*) *Wade* v. *Coope*, 2 Sim. 155.

(*x*) *Earl of Kinnoul* v. *Money*, 3 Swanst. 202, n.; *Hudson* v. *Carmichael*, Kay, 613; *Hall* v. *Hall*, (1911) 1 Ch. 487; *ante*, p. 353.

has conveyed the property to the husband absolutely, if by extrinsic evidence it appears that she did so merely to enable him to mortgage it (*y*).

But the question whether a wife who charges her property for the purpose of paying her husband's debts is entitled to have her property indemnified by him against the charge is a matter of inference, to be drawn from the circumstances of each particular case (*z*).

To prevent an inference being drawn that the wife was a surety only, it must be shown by affirmative evidence either that the money was applied for her benefit, or that when raised it became her separate property, and was afterwards given by her to him (*a*).

If the wife's leasehold be mortgaged by the husband and wife, and the husband covenants to pay the debt, and afterwards reduces the amount of the debt out of his money, and dies, leaving his wife the survivor, the wife may, it seems, redeem, on placing the husband's estate in the situation of the mortgagee to the amount of the sum paid by the husband (*b*).

If a term of years be purchased by a husband, in the joint names of the husband and wife, and the husband mortgage it, and afterwards die in the lifetime of his wife, the creditors of the husband may, it seems, redeem (*c*).

Wife creditor of husband.

A creditor was permitted to redeem whose debt was considered to be released by operation of law, and to subsist in equity only; as in the case (*d*) of a bond given by a husband before marriage to his wife for a sum of money payable after his decease.

Committee of lunatic.

A committee of a lunatic may redeem out of the rents and profits for the benefit of the lunatic's estate (*e*); and it is said that he may do so out of the personal estate of the lunatic without the leave of the Court, if threatened with foreclosure (*f*); but in such a case the proper course is to obtain an order of the Court (*g*).

(*y*) *Re Marlborough, Davis* v. *Whitehead,* (1894) 2 Ch. 133.

(*z*) *Paget* v. *Paget,* (1898) 1 Ch. 470, C. A.

(*a*) *Hall* v. *Hall,* (1911) 1 Ch. 487.

(*b*) *Pitt* v. *Pitt,* T. & R. 180. *Sed quære,* if the husband's representatives would not have been absolutely entitled to the equity of redemption if it had been reserved to *him,* the estate being a chattel real, of which he could have absolutely disposed without his wife's concurrence. *Note.*—In the register book the case is entered as *Pitt* v. *Reid.* And see *Clark* v. *Burgh,* 2 Coll. 221.

(*c*) *Watts* v. *Thomas,* 2 P. Wms. 365.

(*d*) *Acton* v. *Peirce,* 2 Vern. 480.

(*e*) *Exp. Grimstone,* Amb. 706.

(*f*) Pow. Mort., p. 285, n.

(*g*) See 53 Vict. c. 5, s. 117 (1).

Guardian.

And a guardian of an infant may apply the rents of a descended estate in discharge of the principal of the mortgage, because the mortgage is a subsisting charge on the estate (*h*).

Heir.

Subject to the Land Transfer Act, 1897, an equity of redemption will, in its descent, devolve in like manner as the legal estate, that is, to the common law, or customary heir, according to the circumstances of the case; to such heir the right of redemption of course belongs; and upon an action by an heir-at-law to redeem, a *primâ facie* title is sufficient (*i*). So, also, if the land be gavelkind or borough-English, the heir special will be entitled to redeem (*k*).

Dowress and tenant by curtesy.

A dowress (*l*) may redeem. So, also, may a tenant by curtesy (*m*).

Devisee.

The devisee of the equity of redemption is entitled to redeem, and he need not make the heir-at-law of the mortgagor a party, unless he claims to have the will established (*n*). And a devisee has a right to redeem against a purchaser from a pretended heir, with notice of the pendency of a suit to establish the will (*o*).

Personal representatives.

If the subject-matter of the mortgage is leasehold or other personalty, the legal personal representatives of a deceased mortgagor may redeem. But if the mortgage is of realty in fee, the personal representatives could not, before the Land Transfer Act, 1897, redeem in the absence of the heir-at-law or customary heir or devisee (*p*). Even though the mortgage was for a term created out of the inheritance, the legal personal representatives could not redeem; so also if the equity of redemption escheats to the Crown (*q*). So, where freeholds were mortgaged for a term, and the owner of the equity of redemption, by his will, directed the mortgage to be paid off and the term to be assigned to one person, and devised the fee to another person, it was held that the right to redeem passed to the devisee of the fee (*r*). But

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(*h*) *Palmes* v. *Danby*, Prec. Ch. 137.

(*i*) *Pym* v. *Bowerman*, 3 Swanst. 241, n.; *Lloyd* v. *Wait*, 1 Ph. 61.

(*k*) *Fawcett* v. *Lowther*, 2 Ves. Sen. 300, 304.

(*l*) *Palmes* v. *Danby*, Prec. Ch. 137. But see *Dawson* v. *Bank of Whitehaven*, 6 Ch. D. 218, C. A., *post*, p. 729.

(*m*) *Jones* v. *Meredith*, Bunb. 346.

(*n*) *Saunders* v. *Hawkins*, 8 Vin. Abr. 156; 2 Eq. Ca. Abr. 771; *Hall* v. *Dench*, 1 Vern. 342; *Lewis* v. *Nangle*, 2 Ves. Sen. 431; *Phillips* v. *Hele*, 1 Rep. in Ch. 191. See 1 Vict. c. 26, s. 3.

(*o*) *Finch* v. *Newnham*, 2 Vern. 216.

(*p*) *Fray* v. *Drew*, 11 Jur. N. S. 130.

(*q*) *Catley* v. *Sampson*, 33 Beav. 551.

(*r*) *Amhurst* v. *Litton*, 5 Bro. P. C. 254.

personal representatives can now redeem a mortgage of freeholds (*s*).

The persons who are to avail themselves of the equity of redemption must be the same as those who, during the time fixed in the mortgage deed, could have redeemed at law, or their representatives or assigns; for otherwise equity would alter the bargain; and therefore, where a term of years is mortgaged by an executor or administrator, the equity of redemption passes to the representative of such executor or administrator, though he be not the representative of the deceased, and does not pass to the administrator *de bonis non* of the deceased (*t*).

Legatees.

Legatees whose legacies are charged on the mortgaged land may apparently redeem (*u*); but it seems that they can only sue through their trustee or executor, unless he refuses to do so (*x*).

Tenant for life.

Where property subject to a mortgage is settled to uses, the tenant for life is entitled to redeem, and to have the legal estate conveyed to himself, but must hold the equity of redemption subject to the limitations of the settlement (*y*). So, also, an equitable tenant for life may redeem (*z*).

Mortgagee of life estate.

The mortgagee of tenant for life may redeem a mortgage in fee; but if the tenant for life die before decree, his mortgagee will have to pay costs, and his action will be dismissed (*a*).

Remainderman.

A tenant in tail (*b*), or other remainderman or reversioner (*c*), may redeem. But a remainderman cannot, during the continuance of a particular estate, redeem a mortgage of the fee where the mortgagee of the fee is also mortgagee of the particular estate, except by consent of the mortgagee (*d*).

Jointress.

A jointress may redeem (*e*).

ii.—Limitation of Equity of Redemption to new Uses.—A very important class of cases is next to be considered, viz.,

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(*s*) *Re Harrowby and Paine*, W. N. (1902) 137.

(*t*) *Butler* v. *Bernard*, Freem. Ch. 139; *Skeffington* v. *Whitehurst*, 9 Cl. & F. 219. And see *Greenwood* v. *Rothwell*, 7 Beav. 279.

(*u*) *Batchelor* v. *Middleton*, 6 Hare, 75, 78.

(*x*) See *Troughton* v. *Binks*, 6 Ves. 573.

(*y*) *Lewis* v. *Nangle*, Amb. 150; 1 Cox, 240; *Earl of Kinnoul* v. *Money*, 3 Swanst. 202, n., at p. 219, n.; *Wicks* v. *Scrivens*, 1 J. & H. 215; *Pearce* v. *Morris*, L. R. 5 Ch. 227.

(*z*) *Haymer* v. *Haymer*, 2 Vent. 343.

(*a*) *Riley* v. *Croydon*, 2 Dr. & S. 293.

(*b*) *Playford* v. *Playford*, 4 Ha. 546.

(*c*) *Aynsley* v. *Reed*, Dick. 249.

(*d*) *Ravald* v. *Russell*, Yo. 9, 21; *Prout* v. *Cock*, (1896) 2 Ch. 808.

(*e*) *Howard* v. *Harris*, 2 Ch. Ca. 147; *Smithett* v. *Hesketh*, 44 Ch. D. 161.

those in which the question has been, whether it is intended by the parties making the mortgage that the equity of redemption shall be limited in a manner different from the uses subsisting in the estate prior to the mortgage, or shall result to the same uses.

"The only safe rule, and the only rule of any practical value, to be deduced from the authorities is this: that each case must depend on its particular circumstances, that in each case the intention must be collected from the instrument which has given rise to the question, and that that instrument must be interpreted according to the ordinary rules of interpretation" (*f*).

General presumption against change of ownership.

As a general rule, it may be laid down that where the equity of redemption is limited to persons other than the owners, the right is nevertheless in the owners (*g*); but the mere frame of the deed may so clearly show an intention to act upon the limitation of the equity of redemption that the Court would be bound to give effect to it (*h*); but a clear intention must be shown to change the ownership of the property (*i*) for purposes other than those of the particular mortgage (*k*).

It is not necessary that the mortgage deed itself should contain an express declaration or recital of such intention (*l*); but where no such declaration or recital appears, the presumption is that the mortgage is for the mere purpose of raising money, and consequently against any alteration of the previous rights. The presumption, however, may be rebutted if the special circumstances of the case afford sufficient evidence of intention (*m*). "In cases thus depending on intention there cannot, of course, be any general rule. Each case must depend upon its own particular circumstances. The authorities seem to me to furnish us with no further guide than that the charge upon the estate, being, of course, in cases of this nature, the immediate motive of the deed, the Court will not impute the further intention to change the limitations, unless that further intention appears by recital or other special circumstances, and that the mere fact of

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(*f*) *Plomley* v. *Felton*, 14 App. Ca. 61, at p. 66.

(*g*) *Hipkin* v. *Wilson*, 3 De G. & S. 738.

(*h*) Sug. H. L. 174. See *Rowel* v. *Walley*, 1 Rep. in Ch. 116.

(*i*) *Lord Hastings* v. *Astley*, 30 Beav. 260.

(*k*) *Barnett* v. *Wilson*, 2 Y. & C. C. C. 407; *Eddleston* v. *Collins*, 3 De G. M. & G. 1; *Parker* v. *Hills*, 7 Jur. N. S. 833, H. L.; reversing 4 De G. & J. 362.

(*l*) *Innes* v. *Jackson*, 16 Ves. 367. See *Eddleston* v. *Collins*, 3 De G. M. & G. 1, at p. 15.

(*m*) *Heather* v. *O'Neil*, 2 De G. & J. 399, and cases there cited.

the reservation of the equity of redemption deviating in a slight or partial degree from the original limitations of the estate, does not of itself furnish sufficient ground for imputing the further intention to change the limitations, but is rather to be ascribed to inaccuracy or mistake" (*n*).

Express limitation of different uses.

In *Innes* v. *Jackson* (*o*) there was a distinct and subsequent clause declaring the uses; and a doubt has been expressed whether the intention to change the equitable title to the estate would ever be inferred from the mere language of the proviso for redemption (without aid from other parts of the instrument), in whatever terms it were framed (*p*). At all events, in cases depending merely upon the reservation of the equity of redemption, variations which can reasonably be referred to mistake or inaccuracy are not to be regarded; but if the variations be such that they cannot from their nature be referred to mistake or inaccuracy, they must, it is submitted, have their effect (*q*).

Several mortgages with different limitations.

Where several mortgages were made in which the limitations of the equity of redemption varied, it was held that no intention to re-settle was shown (*r*); but the Vice-Chancellor's decision, which was reversed, may be deemed more in accordance with other authorities (*s*).

Variation contrary to instructions.

Where the instructions for the mortgage were to re-settle the estate upon the same uses, no effect was given to an alteration (*t*).

There is a distinction also between a mere mortgage and a conveyance to trustees on trusts expressly declared, in which latter case effect will be given to the altered ownership (*u*).

Mortgage under power.

If a mortgage be made under a power of appointment, whether in fee or for years, it is a revocation of the subsisting uses *pro tanto* (*x*); and therefore whether the form of the proviso for redemption be that on payment of the

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(*n*) Per Turner, L.J., in *Heather* v. *O'Neil*, *sup.*, at p. 414; *Plomley* v. *Felton*, *inf.*; *Re Byron's Settlement*, (1891) 3 Ch. 474.

(*o*) 16 Ves. 356; commented on in *Martin* v. *Mitchell*, 2 J. & W. 423, 424; and reversed, 1 Bli. 136. See *Rowel* v. *Walley*, 1 Rep. in Ch. 116.

(*p*) Dav. Conv. (4th ed.) vol. ii. pt. 2, pp. 41, 42.

(*q*) *Heather* v. *O'Neil*, 2 De G. & J. 399, 416; *Plomley* v. *Felton*, 14 App. Ca. 61, 65.

(*r*) *Whitbread* v. *Smith*, 3 De G. M. & G. 727.

(*s*) *Barnett* v. *Wilson*, 2 Y. & C. C. C. 407; *Atkinson* v. *Smith*, 3 De G. & J. 186; Farw. Pow. (2nd ed.) 168; Sug. Pow. (8th ed.) p. 274.

(*t*) *Meadows* v. *Meadows*, 16 Beav. 404.

(*u*) *Fitzgerald* v. *Fauconberg*, Fitz. 207; followed in *Heather* v. *O'Neil*, 2 De G. & J. 399.

(*x*) *Thorne* v. *Thorne*, 1 Vern. 141. See *Perkins* v. *Walker*, 1 Vern. 97.

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mortgage money the appointment shall be void, or that the estate shall be reconveyed to the old uses, or shall be conveyed to the use of the mortgagor, his heirs and assigns, the equity of redemption will in all respects, in the absence of evidence of contrary intention, correspond with the title prior to the mortgage (*y*).

The case of *Anson* v. *Lee* (*z*) seems opposed to this rule, but though it has been questioned by Sir E. Sugden (*a*), it has been considered to be good law (*b*).

The result is, that unless there be on the face of the instrument, or from a comparison of the wording of different instruments of mortgage, an indication of an ulterior intention inconsistent with a future exercise of the power (*c*), in the case of the execution of a special power by way of mortgage, the right of redemption will remain in the persons entitled to the estate in default of appointment (*d*). If a mortgage is made by the exercise of a general power of appointment, the equity of redemption is apparently in the appointor (*e*).

Where a mortgagor, having a power to appoint by will, appointed to the mortgagee by will and covenanted not to revoke the will, the mortgage did not prevent revocation, but the mortgagor was left open to an action for damages (*f*) although he had become bankrupt, as the contingent liability under the covenant was incapable of proof under the bankruptcy and not released by it (*g*).

Where the donee of a general power of appointment by will, in consideration of money lent to him, covenants by deed to exercise the power by will giving the lender a first charge on the fund and does so, the fund is assets for the payment of the appointor's debts generally, and the lender has no priority over the other creditors. All that the lender gets by the deed is the personal covenant of the borrower and the right to damages for the breach of it; as regards the fund he is a mere volunteer (*h*).

(*y*) See *Innes* v. *Jackson*, 16 Ves. 367; *Hipkin* v. *Wilson*, 3 De G. & S. 738. See *Fitzgerald* v. *Fauconberg*, *sup.*

(*z*) 4 Sim. 364.

(*a*) Sug. Pow. (8th ed.) p. 275.

(*b*) *Whitbread* v. *Smith*, 17 Jur. 725.

(*c*) *Fitzgerald* v. *Fauconberg*, Fitz. 207; *Barnett* v. *Wilson*, 2 Y. & C. C. C. 407, but *quære* this case.

(*d*) *Innes* v. *Jackson*, 16 Ves. 356.

(*e*) *Re Van Hagan*, 16 Ch. D. 30.

(*f*) Shep. Touchst. by Preston, 401; Sug. Pow. (8th ed.) p. 214; *Robinson* v. *Ommaney*, 23 Ch. D. 285, C. A.

(*g*) *Robinson* v. *Ommaney*, *sup.*

(*h*) *Re Lawley*, *Zaiser* v. *Lawley*, (1902) 2 Ch. 799, C. A., aff. (1903) A. C. 411.

Where real estate was settled upon trust for a married woman for life, and subject thereto upon trust for such persons as she should by deed or will appoint, with trusts over in default of appointment, and the tenant for life mortgaged the property, reserving the right of reconveyance to her and her heirs or assigns, or as she or they should direct, and she afterwards made a will containing a general devise to her sister and her children, it was held that the real intention was not to confer upon the mortgagor an absolute estate in fee simple, but that the equity of redemption should follow the original limitations in her favour, including her power of appointment, which it was further held was not exercised by the general devise contained in her will (*i*).

Inconsistency between proviso for redemption and trust of surplus sale moneys.

By a marriage settlement land of the husband was conveyed to such uses as the husband and wife should jointly appoint, with remainders over in default of appointment. The husband and wife mortgaged the property in exercise of their power, and by the mortgage deed the reservation of the equity of redemption was to the old uses, and the trusts of the surplus sale moneys were for the husband, his heirs, executors, and administrators; it was held that the latter trust prevailed (*k*). A resulting trust is to be applied in these cases only where it appears that the taker is not intended to take beneficially (*l*).

Mortgages by husband and wife.

These questions have generally arisen in mortgages by husband and wife; and the principle of equity in such cases is, that if money be borrowed by the husband and wife upon the security of the wife's estate, although the equity of redemption is by the mortgage deed reserved to the husband and his heirs, or to the husband and wife and their heirs, yet there shall be a resulting trust for the benefit of the wife and her heirs (*m*), and that the wife or her heir shall redeem, and not the heir of her husband (*n*). So where a wife for the purpose of enabling her husband to raise money assigned a lease to him which he mortgaged, the wife joining in the mortgage deed, which reserved the equity of redemption to him, and parol evidence proved that

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(*i*) *Re Byron's Settlement, Williams* v. *Mitchell*, (1891) 3 Ch. 474.

(*k*) *Jones* v. *Davies*, 8 Ch. D. 205.

(*l*) *Ibid.*, at p. 216.

(*m*) And see *Pitt* v. *Pitt*, T. & R. 180, *ante*, p. 722, note (*b*), a case of the wife's leasehold mortgaged by husband.

(*n*) See *Huntington* v. *Huntington*, 2 Vern. 437; *Corbett* v. *Barker*, 1 Anst. 138; 3 Anst. 755; *Ruscombe* v. *Hare*, 6 Dow, 1.

she only assigned the lease that he might borrow money on it, it was held that the equity of redemption resulted to her (*o*). The same principle applies if the wife concur in a mortgage of her jointure lands (*p*), in which case the general rule is, that her concurrence to let in the mortgage shall not prejudice her rights, although the equity of redemption be limited to the husband and his heirs, but she shall, on his death, be admitted to redeem.

On the same principle, where a widow entitled to dower concurred with the heir-at-law for the purpose of releasing her dower in a mortgage to a building society, it was held that the release was made only for the purposes of the security, and was at an end when the reconveyance took place so as to restore her right to dower (*q*). The decision must have been different if the mortgage had been made by a husband married before the Dower Act, with the concurrence of his wife to release her dower, as in that case he would have died entitled only to an equitable estate out of which there could then be no dower (*r*).

The general principle to be applied in deciding whether it is the estate of the wife, or the estate of the husband (if the wife join in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure out of the estate, and there is a mere reservation in the proviso for redemption, which would carry the estate from the person who was owner at the time of executing the mortgage; or where the words admit of any ambiguity), is, that there is a resulting trust for the benefit of the wife, or for the benefit of the husband, as the case may be (*s*); but it is not necessary, in order to bar the wife, that there should be sufficient evidence in the recitals to inform her of the alteration in the limitations (*t*).

The old uses were held to be altered where the mortgage was made by a husband under a general power, and there was superadded a trust for sale and an express trust for himself in fee (*u*).

And so where a modification of the equity of redemption was

(*o*) *Re Duke of Marlborough, Davis* v. *Whitehead,* (1894) 2 Ch. 133.

(*p*) *Cotton* v. *Cotton,* 2 Rep. in Ch. 72; *Brend* v. *Brend,* 1 Vern. 213; *Southcoat* v. *Manory,* Cro. Eliz. 744.

(*q*) *Meek* v. *Chamberlain,* 8 Q. B. D. 31.

(*r*) *Dawson* v. *Bank of Whitehaven,* 6 Ch. D. 218, C. A.

(*s*) See *Jackson* v. *Innes,* 1 Bli. 126.

(*t*) *Innes* v. *Jackson,* 16 Ves. 356.

(*u*) *Heather* v. *O'Neil,* 2 De G. & J. 399.

made in order to enable the wife to deal with it without a fine (*x*).

Where a wife joined in a mortgage and released a rent-charge to which she was entitled, her equity of redemption was not barred because there was no express contract to bar it (*y*). The same result followed where the wife was ignorant of the effect of the proviso and had no intention to bar her rights (*z*).

Similarly, where money of a married woman was lent on mortgage, and by the mortgage deed the mortgage money was made payable to the husband and wife or the survivor, on proof that the wife did not consent and was not represented by a separate solicitor the deed was rectified (*a*).

Effect where equity of redemption is made subject to power.

In one case (*b*), in which the estate of the wife was conveyed by way of mortgage in fee, and the equity of redemption was limited to such uses as the husband and wife should jointly appoint, and in default of such joint appointment, then as the wife should by will appoint, and in default of any such appointment, to the wife in fee, the Master of the Rolls doubted if there was any alteration of the wife's estate, but this opinion is justly questioned by Sir E. Sugden (*c*).

In a later case, where husband and wife demised the wife's lands, and covenanted to levy a fine, to confirm the mortgage term, and subject thereto to enure to the use of the husband in fee, and for no other purpose whatever, it was held that the wife's right of redemption was barred (*d*).

Chattels real.

The above rule applies equally to a mortgage of the wife's chattels real, unless a contrary intention appear from the deed (*e*), though slighter evidence would appear to be sufficient in this case (*f*).

The case of *Ruscombe* v. *Hare* (*g*), in the House of Lords, shows strongly the force of the rule. In that case the estate devolved on the wife already charged with the mortgage, and the husband paid a considerable sum in keeping down the

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(*x*) *Atkinson* v. *Smith*, 3 De G. & J. 186; hardly reconcilable with *Whitbread* v. *Smith*, 3 De G. M. & G. 727. See Sug. Pow., 8th ed. p. 285; Farw. Pow. p. 168.

(*y*) *Re Betton's Trust Estates*, L. R. 12 Eq. 553.

(*z*) *Stansfield* v. *Hallam*, 5 Jur. N. S. 1334; 29 L. J. Ch. 173.

(*a*) *Knight* v. *Knight*, 11 Jur. N. S. 617.

(*b*) *Martin* v. *Mitchell*, 2 J. & W. 423.

(*c*) 1 Sug. Pow. (8th ed.) p. 311.

(*d*) *Reeve* v. *Hicks*, 2 S. & St. 403.

(*e*) *Clark* v. *Burgh*, 2 Coll. 221; *Pigot* v. *Pigot*, L. R. 4 Eq. 549.

(*f*) *Watts* v. *Thomas*, 2 P. Wms. 365.

(*g*) 2 Bli. N. S. 122. And see *Wood* v. *Wood*, 7 Beav. 183.

interest; he and his wife afterwards joined in deeds of conveyance and fine to the mortgagee, reserving the equity of redemption to the husband in fee; after his death, the heir of the wife obtained a decree for redemption against his heir, and against the representatives of a purchaser of part of the estate from him.

General result of the cases.

The following conclusions may be drawn:—

1. Where the mortgage is for the mere purpose of raising money, the presumption is against any alteration in the previous rights.

2. A different reservation of the equity of redemption is not enough to rebut the presumption.

3. A recital is not necessary, but is very advisable.

4. A subsequent clause declaring new uses will suffice, especially where the mortgage is of a term and the new uses are declared of the fee.

5. There must be sufficient evidence of intention to alter the previous rights, which will depend upon the circumstances of each case.

6. It will require stronger evidence to alter the rights of a wife.

7. The alteration will be effectual if there is an object ulterior to the purposes of a mortgage.

8. The above principles apply to an appointment by way of security.

Bar of estate tail.

The effect on the old uses of a disposition by a tenant in tail by way of mortgage or for any other limited purpose, is regulated by statute (*h*), the effect of which is that a disposition for a limited purpose, if it create only an estate *pour autre vie*, or a term of years absolute or determinable, or a charge without any estate to secure it, is only a bar of the entail *pro tanto*, although an intention is expressed or implied that it should operate as a total bar; to give effect to such an intention, the deed must contain a further valid disposition to the extent intended; whilst, on the other hand, a disposition creating an actual estate greater than an estate *pour autre vie* will operate as a total bar of the estate tail to the extent of the estate created, although it be only as a security, and the deed declare that it is intended to be a bar *pro tanto* merely. To give effect to that intention the estate tail

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(*h*) 3 & 4 Will. IV. c. 74, s. 21, *ante*, p. 373.

must be re-limited subject to the interest created. In either case the further limitations may be created by the same deed; for, although the statute denies effect to a mere intention, whether implied or expressed, yet it does not of course prohibit the express limitation of the old or any other uses which the tenant in tail may choose to introduce. The clause expressly denies, in the general case provided for, effect to an express declaration confining the operation of the deed to the incumbrance created, whilst it equally denies, in the excepted cases, effect to an express declaration extending the operation of the charge beyond its immediate purpose; the object was to put an end to such questions as arose in *Jackson* v. *Innes* (*i*). The Act does not prevent a re-settlement of the equity of redemption to former uses (*k*).

In a case arising in New South Wales, to which colony the Fines and Recoveries Act does not extend, where a mortgage recited that the mortgagor was entitled under his father's will to a life estate, with remainder to his children as tenants in tail, with cross remainders between them, and that for the purpose of increasing the mortgagee's security, a daughter and her husband had agreed to join for the purpose of barring the entail; and the deed provided that if the money should be paid, the mortgagee should reconvey the hereditaments to the mortgagors according to their respective estates and interests therein, it was held that the hereditaments must be reconveyed to the uses limited by the will, and not as altered for the purposes of the mortgage (*l*).

Mortgage not redeemable before day of payment.

iii.—When the Right of Redemption first arises.—A mortgage is not redeemable before the day thereby fixed for the payment of the mortgage moneys, though the full amount of principal and interest up to that day be offered to the mortgagee (*m*), unless the mortgagee demands payment (*n*). This period is usually six months from the date of the deed. But the period may be shorter or longer, provided its duration is fixed and not unreasonable (*o*). The period must be ascertainable by

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(*i*) 1 Bli. 123; Sugd. H. L. 174. See Carson, R. P. Stat., p. 283.

(*k*) See *Re Oxenden*, 74 L. J. Ch. 234.

(*l*) *Plomley* v. *Felton*, 14 App. Ca. 61. See *Re Byron's Settlement, Williams* v. *Michell*, (1891) 3 Ch. 474.

(*m*) *Brown* v. *Cole*, 14 Sim. 427. See *Burrowes* v. *Molloy*, 2 J. & L. 521; *Burrough* v. *Cranston*, 2 Ir. Eq. R. 203. But see *ante*, p. 142.

(*n*) *Bovill* v. *Endle*, (1896) 1 Ch. 648.

(*o*) See *ante*, pp. 13, 142.

reference either to a fixed day, or to the happening of a certain event; if the period be uncertain, or of unreasonable duration, equity may grant relief by decreeing redemption before the determination of the period (*p*).

The proviso for redemption is not merely a restriction on the mortgagee's right, but is a substantive agreement between the parties as to the time of payment (*q*).

Redemption was allowed before the day of payment under a peculiar form of proviso enabling the mortgagor to redeem on a day named, or on payment before or after it (*r*).

Time of redemption under Lands Clauses Act.

The Lands Clauses Act (*s*) provides for the payment off of mortgages of lands compulsorily taken before the day limited for payment, with compensation for expense of re-investment, and in certain cases, for loss arising through change of investment.

Effect of clause postponing time of payment.

Where a mortgage deed contained mutual covenants binding the mortgagee not to call in, and the mortgagor not to pay off, the loan for five years, it was held that a subsequent mortgagee with notice of the covenants was not entitled to redeem the prior mortgage until the expiration of the stipulated period (*t*).

The right to call in the money, and the correlative right to redeem, may be postponed by agreement until after the happening of a given event, as the death of a named person (*u*).

Alternative periods.

Where the loan is made repayable at the end of six or nine months, the borrower may at his option pay off the debt at the end of either period (*x*).

Welsh mortgage.

In a Welsh mortgage, the mortgagor may redeem at any time (*y*).

Effect where no day is fixed for payment.

If the mortgage is made redeemable on payment "or demand," or if no time is fixed for redemption, as in the case of a mortgage by simple deposit of deeds, then, inasmuch as the mortgagee is in a position without formal demand to call in and sue for the debt, the mortgagor has a correlative right to relieve himself from his liability by redeeming at any time (*z*).

(*p*) See *Newcomb* v. *Bonham*, 1 Vern. 8; *Talbot* v. *Bradyl*, 2 Vern. 183; *Cowdry* v. *Day*, 1 Giff. 316.

(*q*) *Day* v. *Day*, 31 Beav. 270.

(*r*) *Harding* v. *Tingey*, 10 Jur. N. S. 872.

(*s*) 8 Vict. c. 18, s. 114.

(*t*) *Lawless* v. *Mansfield*, 1 Dr. & War. 557, *ante*, p. 142.

(*u*) *Ante*, pp. 13, 141.

(*x*) *Reed* v. *Kilburn Co-operative Soc.*, L. R. 10 Q. B. 264.

(*y*) See *ante*, p. 33.

(*z*) See *inf.*

Mortgagee in possession.

If a mortgagee enters into possession before the day fixed for payment the mortgagor may redeem at once (*a*).

Mortgagee entitled to six months' notice.

iv.—Notice to redeem.—After default, the mortgagee is generally entitled to notice before he can be compelled to accept payment, in order that he may have a reasonable opportunity to find a new security for his money (*b*).

It has become a settled rule that in the case of a regular mortgage deed, with a proviso for redemption, a mortgagor must, after default made by him in payment of the money according to the proviso, give the mortgagee six calendar months' notice of his intention to pay off the mortgage, or six months' interest in lieu of notice (*c*). And there is no exception to the rule arising out of the nature of the mortgaged property (*d*).

Policy maturing.

It has been suggested on the authority of *Smith* v. *Smith* (*d*) that a mortgagee of a life policy is entitled to six months' notice before being paid off, on the policy maturing; but this appears to be incorrect (*e*).

Interest in lieu of notice.

If the mortgagor be willing to pay six months' interest in advance (*f*), notice will be unnecessary (*g*); and whether regarded as interest or as a consideration for the relinquishment by the mortgagee of his right to notice, since the repeal of the usury laws, no danger will be incurred by the transaction.

Meaning of "month."

In mortgage transactions, the expression "month" always means calendar month (*h*).

When a new notice is required.

Where notice is given by the mortgagor to pay off, and the money is not paid on the day, the general rule is that a further six months' interest is payable if the mortgagee demand it (*h*), or unless acquiescence in the delay is to be implied from his conduct (*i*).

Trust for sale.

Where a conveyance on trust for sale, but without any proviso for redemption, was held to be a mortgage, the usual six months' notice was directed (*k*).

(*a*) *Bovill* v. *Endle*, (1896) 1 Ch. 648, stated *inf.* p. 737.

(*b*) See *Browne* v. *Lockhart*, 10 Sim. 420, 424.

(*c*) 2 Ca. and Op. p. 51, tit. Mtge. Burton; *Sharpnell* v. *Blake*, 2 Eq. Ca. Abr. 603, pl. 34; *Smith* v. *Smith*, (1891) 3 Ch. 550.

(*d*) *Smith* v. *Smith*, *sup.*

(*e*) Key & Elph. (9th ed.) vol. ii. 104.

(*f*) *Johnson* v. *Evans* (No. 2), 61 L. T. 18; W. N. (1889) 95, C. A.

(*g*) *Anon.*, Barn. Ch. R. 324; *Hutton* v. *Brown*, W. N. (1881) 116.

(*h*) *Bartlett* v. *Franklin*, 15 W. R. 1077.

(*i*) *Re Moss*, *Levy* v. *Sewill*, 31 Ch. D. 90.

(*k*) *Bell* v. *Carter*, 17 Beav. 11.

Depositee of deeds not entitled to notice.

But in a recent case it has been held that an equitable mortgagee, by deposit of title deeds of land, is not entitled to six months' notice before he is bound to accept a tender of the amount due, nor to six months' interest in lieu of notice (*l*).

It will be observed that in *Bell* v. *Carter*, although there was no proviso for redemption, the legal estate passed for the purpose of the security, and, therefore, it might be reasonably inferred in that case that the loan was intended to be of a permanent character so as to entitle the mortgagee to six months' notice. But in *Fitzgerald's Trustee* v. *Mellersh*, the mortgage being by deposit merely, the just inference from the transaction was that the loan was intended to be temporary, so as to render it unreasonable to infer that the parties intended that a six months' notice should be given. In that case the deposit of title deeds was accompanied by a memorandum containing an undertaking by the mortgagor to execute a legal mortgage on request, but no request had been made, and the undertaking had been rendered impossible of performance by a sale of the mortgaged property with the mortgagee's concurrence, and was accordingly disregarded. No doubt, a memorandum accompanying a deposit of title deeds might be so worded as to sufficiently indicate an intention that the loan should be permanent, so as to entitle the mortgagee to six months' notice or interest in lieu thereof. Of course, a mortgagee would be so entitled under a legal mortgage actually made pursuant to such an undertaking.

Extent by Crown.

If an application is made on behalf of the Crown for sale under an extent (*m*) of an estate belonging to a Crown debtor, which is subject to a mortgage, notice of the application must be given to the mortgagee, and if the estate be sold absolutely under the extent and the money be paid into Court, the Crown will not be allowed upon motion to pay off the mortgagee at once without his consent; but a reference will be ordered to ascertain what is due on the mortgage (*n*).

Immediate demand for payment.

It seems to be settled that if a mortgagee calls in his money and demands immediate payment he is not entitled to notice or interest, and the mortgagor is entitled to redeem on payment of the mortgage money, interest to date and costs (*o*). But

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(*l*) *Fitzgerald's Trustee* v. *Mellersh*, (1892) 1 Ch. 385.

(*m*) See 25 Geo. III. c. 35, s. 1.

(*n*) *R.* v. *Coombes*, 1 Pri. 207.

(*o*) See *Smith* v. *Smith*, (1891) 3 Ch. 550; *Hill* v. *Rowlands*, *inf.*

Notice or interest.

where the notice calling in the money does not demand immediate payment but fixes a day three months after the notice, then it seems that the mortgagor paying the money before that time would not have to pay interest for the unexpired part of the three months. There is no direct authority for this view, but it seems to follow from the rule that a mortgagee, unless he demands immediate payment, is entitled to a reasonable time to find another security for his money (*p*). But mere failure to pay within the three months does not render the mortgagor liable to give a fresh notice or pay six months' interest, provided he keeps the money ready and idle (*q*).

Taking proceedings.

Taking proceedings to compel payment or to enforce the security is equivalent to an immediate demand, and will entitle the mortgagor to pay off at once without notice or interest (*r*), and so will going into possession (*s*).

Administration action.

So a mortgagee who, after the death of the mortgagor, filed a bill for the administration of his estate, was held not to be entitled to six months' notice, or interest in lieu thereof (*t*). And where a mortgagee joined with the residuary legatee under the mortgagor's will in an administration action, and, subsequently to the commencement of the proceedings, the executor gave to the mortgagee six months' notice to redeem, it was held that the latter was bound to accept, in satisfaction of his claims, his principal with interest up to the time of payment, and costs, though such payment was made before the expiration of the notice (*u*). But after judgment in a foreclosure action and the certificate of the master finding the amount of interest due up to the time allowed by the judgment for redemption, that is, six months from the date of the certificate, the mortgagor cannot redeem on an earlier day on payment of interest up to the time of payment only, but must pay the full amount found due by the certificate (*x*).

Consent to sale.

Consent to a sale in an administration suit is equivalent to six months' notice (*y*).

Proof of debt in action.

A mortgagee who comes in and proves his debt in a cause

(*p*) See *Barker* v. *Illingworth*, (1908) 2 Ch. 20.

(*q*) *Edmondson* v. *Copland*, (1911) 2 Ch. 301.

(*r*) See *Hill* v. *Rowlands, inf.*

(*s*) *Bovill* v. *Endle, inf.*

(*t*) *Letts* v. *Hutchins*, L. R. 13 Eq. 176; *Smith* v. *Smith*, (1891) 3 Ch. 550.

(*u*) *Re Alcock, Prescott* v. *Phipps*, 23 Ch. D. 372, C. A.

(*x*) *Hill* v. *Rowlands*, (1897) 2 Ch. 361, C. A.

(*y*) *Day* v. *Day*, 31 Beav. 270.

is bound to take his money without notice, and to join in the conveyance (*z*).

Entry into possession.

In a recent case, a mortgagor absconded before the time fixed by the mortgage deed for payment, and the mortgagee thereupon entered into possession of the premises; it was argued on behalf of the mortgagee that the entry was not the case of taking steps to enforce the security, but merely for the protection of the property; but it was held that such entry was a taking proceedings to enforce the security, so as to deprive the mortgagee of his right to six months' interest in lieu of notice (*a*).

Whether mortgagee enforcing security is entitled to interest payable in advance.

Where, on a mortgage of a ship, it was stipulated that the interest should be payable half-yearly in advance, and the mortgagee sold the ship before one of the days upon which the interest became payable, but the purchase was completed two days after that day, it was held that the mortgagee was not entitled to the next half-year's interest, but only to interest up to the day of completion and actual payment (*b*).

Mortgagor must tender amount due.

v.—Tender of Mortgage Moneys.—A mortgagor who has given notice of his intention to pay off the mortgage on a certain day, must, in order to exclude the right of the mortgagee to a further notice or interest in lieu thereof, make on the appointed day a strict tender of the moneys due, or the Court cannot stop the interest from running, though the circumstances of the case may be such that the Court might wish to do so (*c*). On a proper tender being made, interest stops (*d*), and also all subsequent costs (*e*).

Requisites of tender.

To constitute a good tender, it must be made by the proper person, to the proper person, at a proper time and place, in proper currency, and in a proper manner.

By whom a tender may be made.

A valid tender may be made by any person entitled to redeem, but not by a stranger, for as against him the mortgagee's estate is absolute (*f*). It has been seen that guardians

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(*z*) *Matson* v. *Swift*, 5 Jur. 645.

(*a*) *Bovill* v. *Endle*, (1896) 1 Ch. 648.

(*b*) *Banner* v. *Berridge*, 18 Ch. D. 254, 278.

(*c*) *Sentance* v. *Porter*, 7 Ha. 426. See *Williams* v. *Sorrell*, 4 Ves. 389.

(*d*) *Bishop* v. *Church*, 2 Ves. Sen. 370, 372. See *Garforth* v. *Bradley*, 2 Ves. Sen. 675, 678.

(*e*) *Lord Midleton* v. *Eliot*, 15 Sim. 531; *Woodman* v. *Higgins*, 14 Jur. 846.

(*f*) Lit. s. 334; *Watkyns* v. *Ashwicke*, Cro. Eliz. 132. See *Lomax* v. *Bird*, 1 Vern. 182; *James* v. *Biou*, 3 Swanst. 234.

and committees under the sanction of the Court may redeem (*g*), and accordingly they may make a good tender of mortgage moneys on behalf of infants and lunatics, and it has been said by Lord Coke, that if the heir be an idiot, of what age soever, any man may make the tender for him in respect of his absolute disability, and the law in this case is grounded on charity (*h*).

Tender by solicitor or agent.

A solicitor or other agent may make a good tender on behalf of his client or principal (*i*); and where a solicitor pays off a mortgage on his client's property and takes possession, he is treated as acting as agent for his client (*k*).

A tender by the agent of a debtor of the whole sum demanded by the creditor is good, although the agent is only authorized by the debtor to tender a smaller sum, and offers the rest at his own risk (*l*).

Joint tender.

If the condition was for payment by the mortgagor *and* another person (*m*), payment by that person alone, after the death of the mortgagor, was good; but not during his life.

To whom tender must be made.

At law the tender must formerly have been made only to the persons named in the condition (*n*).

In equity the tender may be made to the persons entitled to receive the money and reconvey the estate, and, if the legal and partial beneficial interest is united in one of such persons, he cannot demand payment to himself on his separate receipt (*o*).

Tender to executors.

Tender may be made to the executors of a deceased mortgagee, who may give a valid receipt for the money before probate (*p*).

Tender to trustees.

A tender to trustees can, it seems, be only made to all the trustees unless they appoint a solicitor to receive the money either by express authority or under sect. 17 of the Trustee Act, 1893 (*q*). The trustee must be properly appointed (*r*), but in the absence of anything to suggest the contrary the person paying the money is bound to assume that the solicitor producing the deed is acting as solicitor for the person having power to give a discharge (*s*).

(*g*) *Ante*, p. 722.

(*h*) Co. Lit. 206 b.

(*i*) See *Ward* v. *Cartter*, L. R. 1 Eq. 29.

(*k*) *Ibid.*

(*l*) *Read* v. *Goldring*, 2 M. & S. 86.

(*m*) Shep. Touchst. by Preston, 141.

(*n*) Co. Lit. 210.

(*o*) *Cliff* v. *Wadsworth*, 2 Y. & C. C. C. 598.

(*p*) *Austen* v. *Dodswell's Executors*, 1 Eq. Ca. Abr. tit. Executors (A. b), pl. 31.

(*q*) *Re Bellamy*, 24 Ch. D. 387, C. A.; *Re Flower*, 27 Ch. D. 592.

(*r*) *Re Hetling and Merton*, (1893) 3 Ch. 269.

(*s*) *King* v. *Smith*, (1900) 2 Ch. 425, 432.

Notwithstanding the statutory powers of giving receipts (*t*), the receipt of trustees will not discharge the mortgaged estate, where the security is for a re-transfer of stock, and only cash is paid, until the trustees have invested it in an authorized investment (*u*).

Tender to one of several joint creditors.

A valid tender at law might be made to one of several joint creditors (*x*), but in equity the receipt of the creditor would not discharge the debtor from claims by the other creditors (*y*). So, where a mortgage is made to several persons jointly, they are in equity tenants in common of the mortgage money, and, accordingly, the receipt of the representatives of such of them as may be dead is necessary to discharge the debtor (*z*). It was therefore formerly usual to insert in mortgages to trustees, and in other cases where the benefit of the mortgage debt and of the security was intended to survive, a joint account clause providing that the receipt of the survivor should be a good discharge for the debt; but the insertion of such a clause is now rendered generally unnecessary by statute (*a*).

Tender to solicitors, &c.

Independently of statutory enactment, a good tender cannot generally be made to the solicitor or other agent of the creditor (*b*).

A solicitor may, however, have an express authority to receive the mortgage moneys. So, where a mortgagee's action was compromised on the terms that the amount agreed upon should be paid out of Court to the plaintiff's solicitor, it was held that the solicitor's receipt discharged the mortgagor and his estate from the debt (*c*). So, also, such authority may be inferred from the circumstances of the case as tending to show that the mortgagee treated his solicitor as agent to receive the mortgage moneys (*d*). But a solicitor, having authority to receive the mortgage moneys, has no implied authority to accept the tender of a cheque in lieu of cash (*e*).

(*t*) 22 & 23 Vict. c. 35, s. 23; 23 & 24 Vict. c. 145, s. 23; and Trustee Act, 1893, s. 20.

(*u*) *Pell* v. *De Winton*, 2 De G. & J. 13.

(*x*) *Husband* v. *Davis*, 10 C. B. 645.

(*y*) *Matson* v. *Dennis*, 10 Jur. N. S. 460. See *Steeds* v. *Steeds*, 22 Q. B. D. 537; *Powell* v. *Brodhurst*, (1901) 2 Ch. 160.

(*z*) *Vickers* v. *Cowell*, 1 Beav. 529; *Powell* v. *Brodhurst*, *sup.*

(*a*) 44 & 45 Vict. c. 41, s. 61, set out *ante*, p. 550.

(*b*) *Withington* v. *Tate*, L. R. 4 Ch. 288.

(*c*) *Bourton* v. *Williams*, L. R. 5 Ch. 655.

(*d*) See *Kent* v. *Thomas*, 1 H. & N. 473.

(*e*) *Blumberg* v. *Life Interests, &c. Corp.*, (1897) 1 Ch. 171; aff. on facts, (1898) 1 Ch. 27.

Statutory provision as to tender to solicitor.

A mortgagor may now make good tender and payment to the mortgagee's solicitor on production by the latter of the deed of reconveyance with a receipt in the body thereof, or indorsed, executed, and signed by the mortgagee (*f*). And trustees may now, by the Trustee Act, 1893 (*g*), appoint a solicitor to be their agent to receive such payment (*h*).

Tender to agent.

A tender made to an agent or servant of the creditor duly authorized to receive payment is a valid tender to the creditor himself (*i*). But as regards general agents, tender to them is, generally speaking, not sufficient, inasmuch as, in the absence of express authority, the receipt of money is not within the scope of an agent's employment (*k*). But the authority to receive payment may be inferred from the circumstances of the case (*l*).

Ratification of tender to agent.

If, however, an agent accepts tender and payment on behalf of his principal without authority, the latter may expressly ratify or by his subsequent conduct show that he has confirmed or acquiesced in the transaction, and in such case the debtor will be discharged (*m*).

Time and place of tender.

If time and place are appointed for payment of the money, tender must be made accordingly.

Tender on appointed day.

A tender by the mortgagor of the money on the appointed day at any convenient time at which the money might be counted before sunset is good at law; but if both the parties meet together at any time of that day, and the mortgagor makes a tender to the mortgagee, who refuses it, the mortgagor need not make a tender again before the last instant of the day (*n*).

Tender at appointed hour.

If a particular hour be appointed, the mortgagor may attend for the purpose of making his tender at any time before the commencement of the next hour, inasmuch as an hour in law is considered to be a twenty-fourth aliquot part of the day. So notice by a mortgagor of attendance for tender at three o'clock

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(*f*) 44 & 45 Vict. c. 41, s. 56, set out *ante*, p. 119.

(*g*) 56 & 57 Vict. c. 53, s. 17, sub-s. (1), *ante*, p. 120.

(*h*) See *sup*. n. (*s*).

(*i*) *Goodland* v. *Blewith*, 1 Camp. 477. See *Anon.*, 1 Esp. 349; *Hart* v. *Hawthorne*, 42 L. T. 79.

(*k*) *Burrough* v. *Cranston*, 2 Ir. Eq. R. 203; *Webb* v. *Crosse*, (1912) 1 Ch. 323.

(*l*) *Kirton* v. *Braithwaite*, 1 M. & W. 310. See *Finch* v. *Boning*, 4 C. P. D. 143.

(*m*) See *Duchess of Cleveland* v. *Dashwood's Executors*, Freem. Ch. 249.

(*n*) *Wade's Case*, 5 Rep. 114 a. See 1 Selw. N. P. (13th ed.) p. 187.

was held to be satisfied by his attendance at the appointed place shortly before four o'clock (*o*).

So, conversely, if an hour is fixed for payment, and the mortgagee does not appear to receive the money at the strike of the hour, the mortgagor must wait until the strike of the next hour, or there will be no sufficient attendance for tender (*p*).

When tender may be made at any time.

If the mortgagee has demanded immediate payment, or if the mortgagor is willing to pay six months' interest in lieu of notice, it seems clear that tender may be made, so as to stop further interest from running, at any time before the mortgagee has commenced his action by actually issuing his writ (*q*).

Where three months' notice to pay off the mortgage has been given, a good tender may be made after the expiration of the notice without giving a fresh notice or paying interest in lieu of notice (*r*).

Tender at appointed place.

If a particular place be appointed by the mortgage deed for the payment of the money, the mortgagee must demand payment at that place (*s*), and he is entitled to receive payment there, so that the mortgagor will not generally be at liberty by his notice to appoint a different place for making his tender (*t*). But where money was charged on land in Ireland, the place fixed for payment, being in Lincoln's Inn, was, upon the whole instrument, disregarded, and the owner of the money was held not to be entitled to have it sent to England free of charges and exchange (*u*).

Tender where no place is appointed.

If no place was appointed by the mortgage deed, then, unless the mortgagee makes no objection to the place appointed by the mortgagor's notice, the mortgagor must generally seek out the mortgagee and tender him the money personally, if within the realm, inasmuch as the money is a sum in gross collateral to the title, and therefore tender on the land would not be sufficient, as in the case of a rent issuing out of the land (*x*). But in such cases if attendance at the mortgagee's place of residence would entail undue hardship on the mortgagor, the appointment by the mortgagor of a different place, if within reasonable access

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(*o*) *Knox* v. *Simmonds*, 4 Bro. C. C. 433.

(*p*) *Anon.*, 1 Coll. 273. See *Bernard* v. *Norton*, 10 L. T. N. S. 183.

(*q*) *Briggs* v. *Calverley*, 8 T. R. 629; *Kirton* v. *Braithwaite*, 1 M. & W. 310.

(*r*) *Edmondson* v. *Copland*, (1911) 2 Ch. 301.

(*s*) *Thorn* v. *City Rice Mills*, 40 Ch. D. 357.

(*t*) *Gyles* v. *Hall*, 2 P. Wms. 378.

(*u*) *Lansdowne* v. *Lansdowne*, 2 Bli. 60.

(*x*) Co. Lit. 210 b.

of the mortgagee, will be good, if the mortgagee makes no objection to the place at the time of the notice.

Time and place for tender not now generally appointed by mortgage deed.

Formerly, when the proviso for redemption was in the form of a condition for defeating the mortgagee's estate, it was customary to specify in mortgage deeds the place and hour of payment of the mortgage money, so as to avoid the danger of his estate being defeated by a tender in his absence on the day named; but now, having regard to the terms of the present proviso for reconveyance, and to the doctrine of equity making mortgages redeemable at any time after default, the practice has been discontinued (*y*).

Production of money due generally necessary.

In order to constitute a valid tender, there must, as a general rule, be actual production and offer of the money (*z*). But non-production may be waived by the creditor (*a*), and actual production may be dispensed with if the creditor refuses to accept the money when the debtor offers to produce it, but before he has actually done so (*b*); but in such cases it must clearly appear that the debtor was ready to produce and pay the money at the time when he offered to do so (*c*).

Tender by letter.

A letter from a debtor stating his willingness to pay the money due to the creditor, and stating that he now tenders the same, but not actually inclosing it, is not a valid tender, though the creditor treats it as such (*d*). But an actual tender by letter will be good if accepted as such by the creditor (*e*).

Summons in mortgagee's action.

A summons by a mortgagor, in an action by the mortgagee on the covenants in the mortgage, for stay of proceedings on payment within one month of the amount due, is not equivalent to a tender, so as to stop the interest (*f*).

What production is sufficient.

The mortgagor may tender the money tied up in bags, if it is proved that they really contained the amount due, and it is the business of the mortgagee to count it (*g*).

(*y*) Dav. Conv. (4th ed.) vol. ii. pt. 2, p. 33.

(*z*) *Polglass* v. *Oliver*, 2 Cr. & J. 15; *Thomas* v. *Evans*, 10 East, 101; *Glascott* v. *Day*, 5 Esp. 48; *Huxham* v. *Smith*, 2 Camp. 21; *Leatherdale* v. *Sweepstone*, 3 C. & P. 342.

(*a*) *Douglas* v. *Patrick*, 3 T. R. 683.

(*b*) *Harding* v. *Davis*, 2 C. & P. 77; *Black* v. *Smith*, Peake, 88; *Jackson* v. *Jacob*, 3 Bing. N. C. 869; *Norway*, 3 Moo. P. C. N. S. 245; *Exp. Danks*, 2 De G. M. & G. 936. But see *Finch* v. *Brook*, 1 Bing. N. C. 253.

(*c*) *Kraus* v. *Arnold*, 7 Moo. 59.

(*d*) *Powney* v. *Blomberg*, 14 Sim. 179.

(*e*) *Jones* v. *Arthur*, 8 Dowl. P. C. 442.

(*f*) *Kinnaird* v. *Trollope*, 42 Ch. D. 610. See as to summons to stay proceedings in mortgagee's action, *post*, Chap. XLIV.

(*g*) *Wade's Case*, 5 Rep. 115. But see *Suckling* v. *Coney*, Noy, 74.

Where a debtor offered a sum of money twisted up in bank notes, which were not shown to the creditor, stating at the time the precise sum offered, this was held to be a sufficient tender (*h*).

Currency in which tender must be made.

Where a loan is made in England of English money, the repayment must, as a general rule, be in English currency, and the debt will carry English interest, and the creditor will have a right to receive payment in England (*i*).

Tender in notes of Bank of England.

A tender of a note of the Bank of England is, in England, a legal tender for all sums above 5*l*., on all occasions; but such notes are not a tender by the Bank of England, or any branch bank thereof. But the governor and company thereof are not to be liable or required to pay and satisfy, at any of their branch banks, notes of the company not made specially payable at such branch bank, although they are liable to pay and satisfy at the Bank of England in London all notes of the company or any branch bank (*k*).

Bank of England notes are not a legal tender in Ireland (*l*), nor in Scotland (*m*).

Tender in notes of private banks.

The statute of Will. IV. applies only to Bank of England notes, and a mortgagee may still object to accept tender of his money in notes of private bankers, or bonds, bills, or other securities for money (*n*). If, however, a mortgagee accepts a tender in such a form, he will not afterwards be heard to say that the tender was not well made (*o*).

Tender in counterfeit coin.

Even if part of the money were counterfeit coin, and the mortgagee accepted it, it has been said that this would be a good tender as such (*p*), though the mortgagee in such case might have relief by an action of deceit, or other action (*q*).

Tender in bills.

If the money is tendered in bills which are afterwards dishonoured, the mortgagee, though he has signed a receipt for the money, will retain his lien on the estate, and will not be compelled to reconvey if he has not already done so (*r*).

(*h*) *Alexander* v. *Brown*, 1 C. & P. 288.

(*i*) *Noel* v. *Rochfort*, 4 Cl. & F. 158. See *Lansdowne* v. *Lansdowne*, 2 Bli. 60.

(*k*) 3 & 4 Will. IV. c. 98, s. 6.

(*l*) 8 & 9 Vict. c. 37, s. 6.

(*m*) 8 & 9 Vict. c. 38, s. 15.

(*n*) *Biddulph* v. *St. John*, 2 Sch. & L. 521.

(*o*) *Lockyer* v. *Jones*, Peake, 180, n.; *Tiley* v. *Courtier*, 2 Cr. & J. 16, n.; *Polglass* v. *Oliver*, 2 Cr. & J. 15.

(*p*) Bac. Abr. Tender, B.

(*q*) Shep. Touchst. by Preston, 136, n.

(*r*) *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31. See *Grant* v. *Mills*, 2 Ves. & B. 306; *Frail* v. *Ellis*, 16 Beav. 351.

Tender by cheque.

A tender by cheque is good if no objection is made to the quality but only to the amount of the tender (*s*). But a solicitor having authority to accept a tender of the amount due has no implied authority to accept the tender of a cheque in lieu of cash so as to make such tender good as against the mortgagees (*t*).

A tender may, by agreement between the parties, be required to be made according to the currency of a British possession, or of a foreign state (*u*).

Tender must be unconditional.

A tender to be good must not be clogged with any condition (*x*); for a person tendering money must not make any terms, but must leave it open to the creditor accepting the money to say that more was due (*y*).

A tender of the amount due on condition of a reconveyance being given on the spot or simultaneously is not conditional (*z*). But where a vesting order is necessary a reasonable time must be allowed to obtain the execution of the reconveyance (*a*).

Demand of a receipt.

A mere request for a receipt does not vitiate a tender, for it is not a condition (*b*); but if the debtor demands a stamped receipt, the tender will be bad whether the debtor actually produces the money or not, for a person to whom money is due, and who refuses to deliver a stamped receipt, is liable to a penalty by statute (*c*). Where, however, a creditor refuses to accept the money tendered to him only on the ground that the amount tendered is insufficient, he cannot afterwards object to the tender on the ground that the debtor required a receipt (*d*). *A fortiori* the tender will be bad if a debtor tenders money but will not pay, unless the creditor will give him a receipt in full of all demands (*e*), or expressing that the sum tendered is the

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(*s*) *Jones* v. *Arthur*, 8 Dowl. P. C. 442.

(*t*) *Blumberg* v. *Life Interests, &c. Corp.*, (1897) 1 Ch. 171; aff. on the facts, (1898) 1 Ch. 27.

(*u*) 33 Vict. c. 10, s. 6.

(*x*) *Jennings* v. *Major*, 8 C. & P. 61.

(*y*) *Strong* v. *Harvey*, 3 Bing. 304; *Evans* v. *Judkins*, 4 Camp. 156; *Chaminant* v. *Thornton*, 2 C. & P. 50; *Peacock* v. *Dickerson*, 2 C. & P. 50, n.; *Mitchell* v. *King*, 6 C. & P. 237.

(*z*) *Rourke* v. *Robinson*, (1911) 1 Ch. 480.

(*a*) *Webb* v. *Crosse*, (1912) 1 Ch. 323.

(*b*) *Jones* v. *Arthur*, 8 Dowl. P. C. 442.

(*c*) *Laing* v. *Reader*, 1 C. & P. 257; *Ryder* v. *Lord Townsend*, 7 D. & Ry. 119.

(*d*) *Richardson* v. *Jackson*, 3 M. & W. 298; *Cole* v. *Blake*, Peake, 179.

(*e*) *Ford* v. *Noll*, 12 L. J. C. P. 2; *Griffith* v. *Hodges*, 1 C. & P. 419; *Glascott* v. *Day*, 5 Esp. 48; *Strong* v. *Harvey*, 3 Bing. 304.

balance due (*f*). So, if a debtor puts down a sum of money, and the creditor offers to take it in part, but the debtor will only allow him to take it as a settlement in full, there is no good tender.

Tender must be of full amount.

As a general rule, the exact amount due must be tendered (*g*); a tender of part only of the amount due is inoperative (*h*).

Requiring change.

A tender of a larger sum requiring change is not good tender of a smaller sum due (*i*), unless the mortgagee objects to give change only on the ground that he disputes the amount of change to be returned (*k*).

No set-off allowed.

The sum tendered must include the full amount due upon the mortgage for principal, interest, and costs; and the tender of a less amount is not made valid by the mortgagor having a set-off for the balance (*l*). So, if there be a mortgage from A. to B. for a certain sum, and an open account between the parties, with a balance due from B. to A., a tender of the mortgage money, deducting the balance due on the account, will not stop the interest, nor prevent costs being allowed to the mortgagee (*m*).

Tender where amount is in dispute.

Though the tender must be unconditional, it may be of a less amount than what the mortgagee alleges to be due, the mortgagor reserving the right to dispute the amount claimed; in such a case, the question of costs will be reserved until it is ascertained whether the amount tendered was sufficient (*n*).

Where the amount is in dispute, the mortgagor must prove that the amount, admitted by him to be due, was actually produced and offered (*o*).

Where the amount of interest was disputed, but the mortgagor made no tender, he was saddled with the costs, although he succeeded on the point of interest (*p*).

Recovery of over-payment.

If the mortgagee extort more than is due, the over-payment

(*f*) *Higham* v. *Baddely*, Gow, 213; *Evans* v. *Judkins*, 4 Camp. 156.

(*g*) *Peacock* v. *Dickerson*, 2 C. & P. 51, n.; *Mitchell* v. *King*, 6 C. & P. 237; *Cottrell* v. *Finney*, L. R. 9 Ch. 541.

(*h*) *Dickson* v. *Clarke*, 5 C. B. 365.

(*i*) *Robinson* v. *Cook*, 6 Taunt. 336; *Betterbee* v. *Davis*, 3 Camp. 70; *Dean* v. *James*, 4 B. & Ad. 547.

(*k*) *Saunders* v. *Graham*, Gow, 111. See *Cadman* v. *Lubbock*, 5 D. & Ry. 389.

(*l*) *Searles* v. *Sadgrove*, 5 E. & B. 639.

(*m*) *Garforth* v. *Bradley*, 2 Ves. Sen. 671.

(*n*) *Greenwood* v. *Sutcliffe*, (1892) 1 Ch. 1, C. A.

(*o*) *Dickinson* v. *Shee*, 4 Esp. 68.

(*p*) *Hodges* v. *Croydon Canal Co.*, 3 Beav. 86.

may be recovered by the mortgagor as money received by the mortgagee to his use (*q*).

Tender of full amount under protest.

Though a conditional tender is not good, a tender under protest of the full amount claimed, reserving the right of the debtor to dispute the amount due, is a good tender if it imposes no condition on the creditor (*r*).

Refusal of mortgagee to accept tender.

When the time fixed by the notice expires, the mortgagee is bound to know the amount due to him, and if that sum, or a sum calculated by the mortgagor to be the probable amount of principal, interest and costs, be tendered to him unconditionally, he is bound to accept it; and if he refuses to accept payment of such sum, he does so at his own peril. If a mortgagee refuses to accept a proper tender of the moneys due to him under his mortgage, his lien on the property will be extinguished (*s*), though the amount due will still be recoverable as a debt (*t*). And if the mortgagee refuses, when called upon, to accept the amount tendered and to execute a reconveyance of the property, he will be liable to an action to enforce the right of redemption, in which suit, if the tender be found to cover principal, interest and costs, the mortgagee will be fixed with the costs of the suit (*u*); but until the day fixed by the decree for redemption, the mortgagee remains invested with all the rights of a mortgagee (*x*), and he may, accordingly, after tender, get in the legal estate (*y*).

Where a mortgagor makes an unconditional tender which the mortgagee refuses to accept, and the mortgagee sells under his power, the sale will be set aside against the mortgagee, and also against a purchaser with notice, notwithstanding the proviso that a purchaser need make no inquiry (*z*).

Dispute as to costs.

If there are any costs due to the mortgagee, the tender must comprise them; and if the costs are in dispute, a decree will be made in such a form that, if costs are chargeable, the common mortgage account will be taken for principal, interest and costs;

(*q*) *Close* v. *Phipps*, 7 Man. & Gr. 586; *Fraser* v. *Pendlebury*, 10 W. R. 104.

(*r*) *Manning* v. *Lunn*, 2 C. & K. 13; *Scott* v. *Uxbridge and Rickmansworth Rail. Co.*, L. R. 1 C. P. 596; *Sweny* v. *Smith*, L. R. 7 Eq. 324; *Greenwood* v. *Sutcliffe*, (1892) 1 Ch. 1, C. A.

(*s*) *Martindale* v. *Smith*, 1 Q. B. 389.

(*t*) 5 Bac. Abr. tit. "Mortgage," D.; Co. Lit. 209 b.

(*u*) *Harmer* v. *Priestly*, 16 Beav. 569; *Hosken* v. *Sincock*, 11 Jur. N. S. 477.

(*x*) *Bank of New South Wales* v. *O'Connor*, 14 App. Ca. 273, P. C.

(*y*) *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119, 128. See Co. Lit. 209.

(*z*) *Jenkins* v. *Jones*, 2 Giff. 99.

but if the costs are not chargeable against the mortgagor, and he has duly tendered principal and interest, the costs of the suit will fall on the mortgagee (*a*).

Partial tender.

A tender of a less sum than is due may be a good tender of the sum offered, if accepted as such by the creditor (*b*); but a creditor accepting a sum so tendered is not thereby precluded from proceeding for the remainder of his claim (*c*). Such a tender will not be vitiated merely by the debtor saying at the time that the amount tendered is all that he considers to be due, but if the tender implies that the creditor, by accepting the money, is required to admit that no more is due, the tender will be conditional, and therefore bad (*d*). The question whether the tender was made conditionally or not is for the jury (*e*).

◆

SECTION II.

THE PARTIES TO AN ACTION FOR REDEMPTION.

Who may be plaintiff.

Any person entitled to redeem a mortgage may institute proceedings as plaintiff to enforce his right of redemption. The question who are persons entitled to redeem has already been considered (*f*).

Who must be made defendants.

As a general rule, the plaintiff seeking to redeem must make all persons interested in the mortgage or in the equity of redemption, and in the proper taking of the accounts, parties to the action.

The mortgagee and his successors in title.

The mortgagee whose incumbrance it is sought to redeem must, of course, be made a defendant to the action; if he be dead, his executors must be made parties as defendants; but the heir of the mortgagee is not now a necessary party, though the mortgage be in fee, or of copyholds, unless, in the latter case, the mortgagee has been admitted (*g*). Where the mortgagee

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(*a*) *Lewis* v. *Webber*, W. N. (1876) 187.

(*b*) *Henwood* v. *Oliver*, 1 Q. B. 409; *Thorpe* v. *Burgess*, 8 Dowl. P. C. 603.

(*c*) *Ibid.*; *Sutton* v. *Hawkins*, 8 C. & P. 259.

(*d*) *Bowen* v. *Owen*, 11 Q. B. 130; *Marquis of Hastings* v. *Thorley*, 8 C. & P. 573.

(*e*) *Eckstein* v. *Reynolds*, 7 A. & E. 80; *Marsden* v. *Goole*, 2 C. & K. 133.

(*f*) *Ante*, pp. 717 *et seq.*

(*g*) 44 & 45 Vict. c. 41, s. 30. See as to copyholds, 50 & 51 Vict. c. 73, s. 45; 57 & 58 Vict. c. 46, s. 88.

has made a settlement of the estate, the first owner of an estate of inheritance, and those having intermediate estates, must be brought before the Court (*h*).

Transferees of mortgages and sub-mortgagees.

If the original mortgagee has transferred the mortgage debt and the security, the transferee must be made a defendant. And if the mortgagor be not a party to the deed of assignment of the mortgage to another party, he may make the original mortgagee a party to his action, for the purpose of making him account; though, it seems, according to the present doctrine, he is not a necessary party; and the same doctrine applies to intermediate assignees (*i*); but derivative mortgagees must be made parties (*k*).

Prior mortgagee.

As a general rule, a prior mortgagee is not a necessary party to a suit to redeem a subsequent mortgagee, unless the amount due to the latter cannot be ascertained in the absence of the prior mortgagee (*l*).

Subsequent incumbrancers.

Pursuant to the general rule that all persons interested in the equity of redemption must be made parties to a redemption action, it seems clear on principle that a mortgagor seeking to redeem a prior mortgagee must make all subsequent incumbrancers parties; inasmuch as such incumbrancers have a right to redeem, and are interested in seeing that the accounts between the mortgagee to be redeemed and the mortgagor are taken on a proper footing.

Sub-mortgage.

But the mortgagor is not a necessary party in a redemption action between his mortgagee and a derivative or sub-mortgagee (*m*).

Second mortgagees, &c.

In the case of redemption of a legal mortgage, a second mortgagee, having the best right to call for the legal estate, is interested in seeing that the decree shall provide for conveyance thereof to him. So it has been held that an equitable mortgagee, by deposit of title deeds, was a necessary party to a redemption suit (*n*); also judgment creditors who had taken out execution (*o*).

Several mortgagors.

If the mortgage is of an estate belonging to several tenants

(*h*) 1 Dan. Ch. Pr. (7th ed.) p. 208; *Yates* v. *Hambly*, 2 Atk. 238.

(*i*) 1 Dan. Ch. Pr. (7th ed.) p. 208. See *Chambers* v. *Goldwin*, 9 Ves. 268.

(*k*) *Hobart* v. *Abbot*, 2 P. Wms. 643.

(*l*) *Lord Kensington* v. *Bouverie*, 16 Beav. 194.

(*m*) Seton (7th ed.), 2011.

(*n*) *Waters* v. *Mynn*, 14 Jur. 341.

(*o*) *Adams* v. *Paynter*, 1 Coll. 530; *Rolleston* v. *Morton*, 1 Dr. & War. 171; but see now Land Charges Act, 1900, s. 2.

in common or of an undivided share of such estate, all the tenants in common must be made parties (*p*).

Trustees, executors, &c. may sue and be sued as representing estate.

Trustees, executors, and administrators may be plaintiffs or defendants to an action of foreclosure without joining their *cestuis que trust*; it being provided by the Rules of the Supreme Court, Ord. XVI. r. 8, that:—

> "Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may at any stage of the proceedings order any of such persons to be made parties either in addition to or in lieu of the previously existing parties.
>
> "This rule shall apply to trustees, executors and administrators sued in proceedings to enforce a security by foreclosure or otherwise" (*q*).

In a suit for redemption, bare trustees of the equity of redemption sufficiently represent the trust estate without the presence of the persons beneficially interested under Ord. XVI. r. 8, unless the Court otherwise directs (*r*).

Where trustees, seeking to set aside a mortgage, made their beneficiaries parties, it was held that the mortgagee, against whom a judgment had been made cancelling the security, had a right to appeal against an order that he should pay the costs of the beneficiaries, and such order was discharged (*s*).

Persons interested in the mortgage money.

As a general rule, persons who are merely interested in the mortgage money, but who have no right to redeem, are not necessary parties. So, where a person contributes part of a sum advanced on the security of a mortgage to his co-lender, he is sufficiently represented by the latter (*t*).

Legatees.

But legatees, whose legacies were charged by the will of the mortgagor upon the equity of redemption, were before the Land Transfer Act, 1897, held to be necessary parties to a redemption suit, instituted by the mortgagor's devisee, in which the mortgagee claimed an absolute title by virtue of the Statute of Limitations (*u*).

(*p*) *Bolton* v. *Salmon*, (1891) 2 Ch. 48.

(*q*) The last paragraph was added by R. S. C. Nov. 1893.

(*r*) *Jennings* v. *Jordan*, 6 App. Ca. 698.

(*s*) *Re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611, C. A.

(*t*) *Emmet* v. *Tottenham*, 10 Jur. N. S. 1090.

(*u*) *Batchelor* v. *Middleton*, 6 Ha. 75.

Representatives of bankrupt mortgagor.

If creditors come in to redeem, on refusal of their trustee to enforce the right of redemption, they must make the persons legally entitled to the equity of redemption, such as executors or the trustee of a bankrupt, parties to their action (*x*). But the equity of redemption now vests on such refusal in the creditor (*y*).

Administrator of felon mortgagee.

In case of felony or treason of the mortgagee, the administrator appointed by the Crown, or his *interim curator,* must be a party as representing the mortgagee (*z*).

Who must be parties where several mortgages are consolidated;

In cases not falling within sect. 17 of the Conveyancing Act, 1881 (*a*), if mortgages of two different estates have been made by the same mortgagor to the same mortgagee at different dates, and in respect of distinct transactions, or if such mortgages become vested by assignment or otherwise in the same person, one of the estates cannot be redeemed without the other, and a subsequent purchaser of the equity of redemption of one of the estates takes subject to all the equities affecting the mortgagor; if, therefore, the equities of redemption of the two estates become vested in different persons by assignment or otherwise, the persons interested, subject to the mortgages, in both estates are necessary parties to an action for redemption (*b*).

—where equity of redemption is vested in several persons.

Where two estates are mortgaged together to the same person for securing the same sum of money, and subsequently the two estates, subject to the mortgage, become vested in different persons, the whole must be redeemed together, and the owner of the equity of redemption of one estate, claiming to redeem both estates, must make the persons interested in the equity of redemption of the other estate parties to his action (*c*).

Heir of mortgagor, when a proper party on redemption by executor.

Where real and personal estate were mortgaged together to secure the same debt, and the mortgagor died leaving a will of the personalty, but intestate as to real estate, and the executrix sought to redeem the whole of the mortgaged property without making the heir-at-law, who was not known, a party, it was held that, though if the heir could have been found he ought to have been a party, yet the Court would not, under the circum-

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(*x*) Barn. Ch. R. 33.

(*y*) *Ante*, p. 720.

(*z*) 33 & 34 Vict. c. 23, s. 21.

(*a*) 44 & 45 Vict. c. 41, s. 17. As to consolidation, see *post*, Chap. XLIII.

(*b*) *Ireson* v. *Denn*, 2 Cox, 425; *Mills* v. *Jennings*, 13 Ch. D. 629, 641, 646, 647, C. A., affirmed, *sub nom. Jennings* v. *Jordan*, 6 App. Ca. 698.

(*c*) *Cholmondeley* v. *Clinton*, 2 J. & W. 1, 134; *Exp. Carter*, Amb. 733.

stances, delay making a decree until he was ascertained and made a party (*d*). But now the heir is not a necessary party (*e*).

Persons having partial interests.

An action for redemption cannot be sustained by a person having a partial interest in the equity of redemption, in the absence of the other persons interested therein (*f*). Thus where the purchaser of a mortgage term of 200 years, created out of and determinable with the estate of a tenant for life, filed a bill to redeem a prior mortgage term of 1,000 years limited by the tenant for life under a power; it was held that the tenant for life was a necessary party, though his interest was merely nominal (*g*).

Remainderman.

A remainderman cannot, during the continuance of the particular estate, redeem a mortgage of the fee, where the mortgagee is also mortgagee of the particular estate, except with his consent (*h*).

Mortgage of real estate by executors.

Where executors have mortgaged real estate for payment of debts, they are not necessary or proper parties to a redemption suit, unless the equity of redemption is limited to them (*i*).

Executor of mortgagor.

To a suit for redemption by the heir of a mortgagor against a mortgagee in possession, alleging that he had been overpaid, the executor of the mortgagor is a necessary party (*k*).

Who must be parties to action by subsequent mortgagees for redemption.

Subsequent mortgagees cannot redeem without making the mortgagor, or his heir, a party to the action (*l*) in order to foreclose him; and if the heir be not within the jurisdiction of the Court, the cause cannot proceed, because the decree is, that the second mortgagee shall redeem the first, and the mortgagor, or his heir, shall redeem the second or be foreclosed (*m*). But now the legal personal representative, and not the heir, is the proper party in such cases (*n*). This principle is carried so far, that if a man mortgage an entire estate to A., which on the

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(*d*) *Hall* v. *Heward*, 32 Ch. D. 430, C. A.

(*e*) *Re Harrowby and Paine, inf.*

(*f*) *Henley* v. *Stone*, 3 Beav. 355; *Chamberlain* v. *Thacker*, 14 Jur. 190; *Chappell* v. *Rees*, 1 De G. M. & G. 393; *Cholmondeley* v. *Clinton*, 2 J. & W. at p. 134; *Bolton* v. *Salmon*, (1891) 2 Ch. 48, 52.

(*g*) *Hunter* v. *Macklew*, 5 Ha. 238; *quære*, if in this case the inheritance was represented.

(*h*) *Prout* v. *Cock*, (1896) 2 Ch. 808.

(*i*) *Greenwood* v. *Rothwell*, 7 Beav. 279. And see *Skeffington* v. *Whitehurst*, 3 Y. & C. Ex. 1.

(*k*) *Baker* v. *Wetton*, 14 Sim. 426; 9 Jur. 98.

(*l*) *Fell* v. *Brown*, 2 Bro. C. C. 276; *Ramsbottom* v. *Wallis*, 5 L. J. (N. S.) Ch. 92; *Farmer* v. *Curtis*, 2 Sim. 466; *King* v. *Smith*, 1 Coll. 555; *Rhodes* v. *Buckland*, 16 Beav. 212. See Seton, 7th ed. 1863.

(*m*) See *sup.* And see *Palk* v. *Clinton*, 12 Ves. 48; *Ramsbottom* v. *Wallis*, *sup.*

(*n*) *Re Harrowby and Paine*, W. N. (1902) 137.

death of the mortgagor devolves on two different persons, and one of those persons mortgages his part to another, and the mortgagee of that part brings his action to redeem, he must make not only the first mortgagee, and his own immediate mortgagor, but also the owner of the other share, parties to the action, because he must redeem the first mortgagee *in toto* (*o*), and the other party, so far as respects part of the estate, is standing in the place of the original mortgagor (*p*).

A second mortgagee might formerly have brought an action to redeem the first mortgagee without making subsequent incumbrancers parties, unless he sought to foreclose them; but the rule at the present time is different, as the form of judgment is that the *mesne* incumbrancers must successively redeem all prior to them or be foreclosed (*q*).

Whether assignees *pendente lite* must be parties.

An assignee *pendente lite* of the equity of redemption is generally a proper party, as having an interest in the subject-matter of the action, and being interested in the accounts. Indeed, it has been held that a redemption suit could not proceed in the absence of an assignee *pendente lite* of the plaintiff in the face of an objection of the defendant on that ground (*r*). But an assignee has no right distinct from that of his assignor (*s*), and therefore it would seem that the assignee, if made a party, would stand in no better position than his assignor as regards any application for extension of time to redeem, or generally as to the terms of redemption, and that he would not be heard in support of his assignor's title to redeem, if contested by the defendant, on the ground of the Statutes of Limitation or otherwise. In these respects it is conceived that the general rule would apply, that an assignment *pendente lite* must not be allowed to vary or affect the rights of the parties to the action (*t*).

(*o*) 12 Ves. 61.

(*p*) *Palk* v. *Clinton*, 12 Ves. 48.

(*q*) Seton, 6th ed. 1982.

(*r*) *Johnson* v. *Thomas*, 11 Beav. 501. See now Ord. XVII. rr. 1, 3, 4; and *Campbell* v. *Holyland*, 7 Ch. D. 166.

(*s*) 11 Ves. at p. 201.

(*t*) As to this rule, see *ante*, p. 654.

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SECTION III.

JURISDICTION IN ACTIONS FOR REDEMPTION.

Chancery Division.

i.—General Jurisdiction.—By the Judicature Act, 1873 (*u*), actions for redemption are assigned to the Chancery Division of the High Court of Justice.

Jurisdiction of County Courts.

By the County Courts Act, 1888 (*x*), the County Courts have jurisdiction in all actions for redemption, where the mortgage or charge does not exceed 500*l.* in amount (*y*), or where the amount actually advanced does not exceed that sum (*z*).

An action by a mortgagor to set aside a sale and conveyance by the mortgagee of the mortgaged property is an action for redemption within the meaning of this Act (*a*).

Charges under the Public Health Act, 1875, s. 257, may be enforced under the provisions of this Act (*b*).

An action for redemption brought in a County Court must be commenced, where both the mortgagee and mortgagor dwell or carry on business in one or more of the metropolitan districts, either in the district in which the mortgagee dwells or carries on business, or in that in which the mortgagor dwells or carries on business (*c*). Elsewhere, in England and Wales, the action must be commenced in the Court within the district in which the lands, tenements, or hereditaments, or any part thereof, are situate.

The jurisdiction of the County Court is not affected by the fact that the mortgagor has become bankrupt (*d*).

ii.—Jurisdiction to order Sale in lieu of Redemption.—By sect. 25 of the Conveyancing Act, 1881 (*e*), it is enacted as follows:—

Sale of mortgaged property in action for foreclosure, &c.

"(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an

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(*u*) 36 & 37 Vict. c. 66, s. 34 (3).

(*x*) 51 & 52 Vict. c. 43, s. 57.

(*y*) See 84 L. T. 587.

(*z*) *Shields, Whitley, &c.* v. *Richards*, W. N. (1901) 106.

(*a*) *Powell* v. *Roberts*, L. R. 9 Eq. 169.

(*b*) *Hornsey* v. *Monarch Bldg. Soc.*, 24 Q. B. D. 1.

(*c*) 51 & 52 Vict. c. 43, s. 84. See *Reg.* v. *Bloomsbury County Court*, 24 Q. B. D. 309.

(*d*) *Medhurst* v. *Golder*, 16 L. T. 50.

(*e*) 44 & 45 Vict. c. 41.

action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

"(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale, and to secure performance of the terms.

"(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

"(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

"(5.) This section applies to actions brought either before or after the commencement of the Act.

"(6.) The enactment described in Part II. of the Second Schedule to this Act (*f*) is hereby repealed.

"(7.) This section does not extend to Ireland."

The Chancery Amendment Act (*g*), which enabled the Court to direct a sale in lieu of foreclosure, did not extend to actions brought by the mortgagor for redemption.

It will be observed that this section applies to foreclosure actions as well as to actions for redemption. Its application to the former class of cases will be considered later (*h*).

When order may be made.

An order for sale may, apparently, be made under this section in a redemption action at any time before the final decree for redemption (*i*).

The order may be made on an interlocutory application before the trial of the action (*k*).

The sale may be ordered to be made out of Court, and the conduct of the sale given to the mortgagor, subject to a reserve

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(*f*) 15 & 16 Vict. c. 86, s. 42, which gave jurisdiction only to order sale in lieu of foreclosure.

(*g*) 15 & 16 Vict. c. 86, s. 48.

(*h*) See *post*, Chap. XLIX.

(*i*) *Union Bank of London* v. *Ingram*, 20 Ch. D. 463 (foreclosure action).

(*k*) *Woolley* v. *Colman*, 21 Ch. D. 169.

price being fixed sufficient to cover the mortgage debt, and subject to security for costs being given (*l*).

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SECTION IV.

PROCEDURE AND PRACTICE IN AN ACTION FOR REDEMPTION.

Form of indorsement of writ.

i.—How a Redemption Action must be commenced.—The Rules of the Supreme Court give the form of indorsement on writs to be used, with such modification as may be necessary, in actions for redemption claiming to have an account taken of what, if anything, is due on the mortgage, and to redeem the property comprised therein (*m*).

The plaintiff in a redemption action may now claim by his writ an order either for redemption alone, or for sale alone, or for sale or redemption in the alternative (*n*).

No cause of action to be joined with an action for recovery of land.

By Ord. XVII. r. 2 of the Rules of 1875, it was provided that no cause of action (with certain exceptions) should, unless by leave of the Court, be joined with an action for recovery of land. The question whether actions for foreclosure or redemption were actions for recovery of land within the meaning of the rule gave rise to some conflict of judicial opinion (*o*).

Now, however, by Ord. XVIII. r. 2 of the Rules of the Supreme Court, it is provided as follows:—

Recovery of land.

> "No cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed.

Joinder of claim for possession in action for foreclosure or redemption.

> "Provided that nothing in this order contained shall prevent any plaintiff in an action for foreclosure or redemption from asking for or obtaining an order against the defendant for delivery of the possession of the mortgaged property to the plaintiff on or after the order absolute for foreclosure or redemption,

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(*l*) *Brewer* v. *Square*, (1892) 2 Ch. 111. See further as to this section, Chap. XLIX., Sect. II.

(*m*) R. S. C. App. A. s. 1 (5).

(*n*) 44 & 45 Vict. c. 41, s. 25, set out *ante*, p. 753.

(*o*) Cf. *Tawell* v. *Slate Co.*, 3 Ch. D. 629; and *Hoar* v. *Loe*, W. N. (1884) 241.

as the case may be, and such an action for foreclosure or redemption and for such delivery of possession shall not be deemed an action for the recovery of land within the meaning of these rules.

"Provided also, that in case any mortgage security shall be foreclosed by reason of the default to redeem by any plaintiff in a redemption action, the defendant in whose favour such foreclosure has taken place may by motion or summons apply to the Court or a judge for an order for delivery to him of possession of the mortgaged property, and such order may be made thereupon as the justice of the case shall require."

Alternative claim to set aside mortgage.

The plaintiff in a redemption action may, without obtaining the leave of the Court or a judge under this rule, ask in the alternative for a declaration that the mortgage is void, and for delivery of possession of the land on that footing (*p*).

Originating summons for redemption.

By Ord. LV. r. 5A of the Rules of the Supreme Court, any mortgagor, whether legal or equitable, or any person having the right to redeem any mortgage, whether legal or equitable, may take out as of course an originating summons returnable in the chambers of a judge of the Chancery Division for redemption, reconveyance and delivery of possession by the mortgagee.

Proceedings for redemption should therefore now generally be commenced by originating summons. Where the defendant in a redemption action commenced by writ disputed the plaintiff's title to redeem, and the plaintiff obtained judgment, it was held that the plaintiff was entitled to such costs only as would have been allowed on an originating summons attended by counsel, including the costs of witnesses examined in Court (*q*).

Service of summons.

The persons to be served with a summons for redemption are to be such as would be the proper defendants to an action for the like relief (*r*); but service on other persons may be directed by the Court or a judge (*s*).

If any of the defendants is out of the jurisdiction, an originating summons cannot be served on him, and accordingly in such case the action must be commenced by writ (*t*), unless the case falls within Ord. XI. r. 8A (*u*). So, too, it seems that a question of priority between mortgagees cannot be

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(*p*) *Hunt* v. *Worsfold*, (1896) 2 Ch. 224.

(*q*) *Johnson* v. *Evans* (No. 1), 60 L. T. 29.

(*r*) R. S. C., Ord. LV. r. 5B.

(*s*) *Ibid.* r. 6.

(*t*) *Re Busfield, Whaley* v. *Busfield*, 32 Ch. D. 123, C. A.; *Re Bullen Smith, Berners* v. *Bullen Smith*, 57 L. T. 924.

(*u*) *Re Aktiebolaget Robertsfors, &c.*, (1910) 2 K. B. 727.

decided on an originating summons (*x*). So, too, the relief to be obtained being limited to the cases mentioned in the rule, an order for personal payment by the mortgagor cannot be obtained (*y*).

Offer to redeem.

ii.—Pleadings in Action for Redemption.—An action for redemption not containing an offer to redeem was formerly demurrable (*z*), and will be dismissed at the hearing, unless the plaintiff offer to redeem on the same terms as a decree for redemption (*a*), though the action is brought by a devisee of the mortgaged estate to have the mortgage paid off out of other assets (*b*), unless the charge is a trust deed to secure incumbrances (*c*). The rule, however, does not apply to a summons taken out by a mortgagor under Order LIVA. for the determination of questions of construction arising on the mortgage deed (*d*). The old cases as to the proper form of pleading by a mortgagor are no longer of much importance except as illustrating the conditions upon which alone a mortgagor will be entitled to relief (*e*). If the pleadings make a case for, without praying redemption, the Court will give leave to amend (*f*), or will oblige the plaintiff to undertake to redeem according to the usual course (*g*).

Mortgagor impeaching the security.

A mortgagor is not entitled to a decree for redemption in an action which impeaches the mortgage securities and contains no prayer for redemption; but such rule does not apply where the issues are not merely mortgage or no mortgage, but whether the defendant, by means of his acts subsequent to the impeached mortgage, had ceased to be mortgagee, and had become absolute owner (*h*).

And it would seem that the plaintiff might in the same action claim to have the mortgage deed set aside, or, in the alternative, to have redemption, if the deed should be upheld (*i*).

(*x*) *Re Giles*, 43 Ch. D. 391.

(*y*) *Farrer* v. *Lacey*, 25 Ch. D. 636.

(*z*) *Tasker* v. *Small*, 3 My. & Cr. 63.

(*a*) *Harding* v. *Tingey*, 10 Jur. N. S. 872.

(*b*) *Hughes* v. *Cook*, 34 Beav. 407.

(*c*) *Jefferys* v. *Dickson*, L. R. 1 Ch. 183.

(*d*) *Nobbs* v. *Law Reversionary Soc.*, (1896) 2 Ch. 830.

(*e*) See *M'Donough* v. *Shewbridge*, 2 Ba. & Be. 555.

(*f*) *Palk* v. *Clinton*, 12 Ves. 49.

(*g*) *Balfe* v. *Lord*, 2 Dr. & War. 480.

(*h*) *National Bank of Australasia* v. *United Hand-in-Hand Co.*, 4 App. Ca. 391.

(*i*) See Ord. XX. r. 6. And see *Bagot* v. *Easton*, 7 Ch. D. 1, C. A., and cases there cited.

A mortgagee, in defending an action for redemption, may deny the title of the plaintiff to redeem, for, except as against a person who can show a good title to the estate of the mortgagor, the estate of the mortgagee is absolute (*k*). But where a mortgagee sets up a title adverse to the mortgage, he cannot, when he fails, fall back on the mortgage and claim the advantages of a mortgagee (*l*).

Release of equity of redemption.

Conveyance by the mortgagor to the mortgagee of the equity of redemption is a defence to an action of redemption (*m*).

An agreement by a mortgagor to give up the equity of redemption, is not binding unless in writing, by virtue of the Statute of Frauds. But a parol agreement between several mortgagees, having deficient securities, with the executors of a deceased mortgagor, to receive each a rateable payment out of the assets in satisfaction of their respective debts, is good, and is not vitiated by the fact of the agreement also providing that the several equities of redemption shall be barred and extinguished (*n*).

A release, if relied upon as a defence, must be raised by the pleadings (*o*).

A contract for the sale to the mortgagee of the equity of redemption is no defence to a redemption action (*p*); but it may now be the subject of counterclaim (*q*).

Mortgagee in possession.

A mortgagee in possession, defendant in a redemption action, who admits that the plaintiff is entitled to a decree, must set out in his defence the state of the account and what is due to him (*r*).

A mortgagee in possession under a foreclosure decree may set up such possession as a defence to a redemption action (*s*); but such defence will only conclude such persons as were parties to the foreclosure action, and not subsequent incumbrancers who were not parties, unless, indeed, their incumbrances were made *pendente lite* (*t*).

(*k*) See *ante*, p. 675. And see *Lomax* v. *Bird*, 1 Vern. 182.

(*l*) *Incorporated Soc.* v. *Richards*, 1 Dr. & War. 258, 334.

(*m*) *Howells* v. *Wilson*, 34 L. J. Ch. 593.

(*n*) *Massey* v. *Johnson*, 1 Exch. 241.

(*o*) Ord. XIX. r. 15.

(*p*) *Howells* v. *Wilson*, 34 Beav. 573.

(*q*) Ord. XIX. r. 3.

(*r*) *Elmer* v. *Creasy*, L. R. 9 Ch. 69.

(*s*) *Whichals* v. *Short*, 2 Eq. Ca. Abr. 608; *S. C.*, *sub nom. Nicholls* v. *Short*, 15 Vin. Abr. tit. "Mortgage," 478.

(*t*) *Bishop of Winchester* v. *Paine*, 11 Ves. 194.

Fraud.

Fraud will be a good defence to an action for redemption. The general rule of equity is, that the Court will render its assistance to all pernors of the profits, and all persons claiming any share or interest in the equity of redemption, unless, indeed, their title may have been obtained by fraud (*u*).

It will be a good defence to an action to redeem a *puisne* mortgage to show that the mortgagor has made that mortgage without discovering a prior mortgage or judgment. In such a case the mortgagor forfeits all right to redeem the *puisne* mortgage, but the *puisne* mortgagee is not barred from redeeming any prior incumbrance (*x*).

So, the *mala fides* of a pledgor, in permitting the pledgee to deal with the property as his own, *may* be a ground for equity not interposing to prevent a sale of the property being made by a sub-pledgee (*y*).

Fraud, if relied upon as a defence, must be raised by the pleadings (*z*).

Statutes of Limitation.

It is a good defence to a redemption action that the mortgagor's right to redeem is barred by lapse of time (*a*).

In all cases, a defendant who relies on the Statute of Limitations must expressly raise the defence by his pleadings (*b*); and the plaintiff, as a general rule, may reply to the plea, or amend his action, or may prove himself to be within the exceptions to the operation of the statute (*c*). But in an action for the recovery of land the defendant need only state that he is in possession, and under that plea he may set up the statute or any other legal defence without notice to the plaintiff notwithstanding Ord. XIX. r. 15 (*d*). And in the case of a mortgage of land, if the mortgagor's statement of claim shows upon the face of it that the time within which the title to the land must be asserted has elapsed, the action would formerly have been demurrable (*e*), and will now be disposed of by proceedings in lieu of demurrer (*f*).

Where the bill for redemption stated that the mortgagee

(*u*) *Parkington* v. *Barrow*, Prec. Ch. 216.

(*x*) 4 & 5 Will. & M. c. 16, *ante*, p. 56.

(*y*) *Nicholson* v. *Hooper*, 4 My. & Cr. 179.

(*z*) Ord. XIX. r. 15.

(*a*) See *post*, p. 768.

(*b*) Ord. XIX. r. 15.

(*c*) *Aggas* v. *Pickerall*, 3 Atk. 225.

(*d*) *Lyell* v. *Kennedy*, 20 Ch. D. at p. 491; but see *ibid.*, 8 App. Ca. 217.

(*e*) *Dawkins* v. *Lord Penrhyn*, 4 App. Ca. 51.

(*f*) Ord. XXV.

entered into possession shortly after the date of the mortgage, and had remained in possession ever since, the Court would not infer that "shortly after" meant within five years, and the demurrer of the mortgagee was overruled (*g*). It must clearly appear that the possession vested for the statutory period (*h*).

Laches.

Unless the statutory period has elapsed, the mere delay of the mortgagor in taking proceedings to determine that a conveyance, on the face of it absolute, is really a mortgage, is no bar to an action claiming a declaration to that effect, and redemption (*i*).

Interrogatories.

iii.—Discovery.—A mortgagee is compellable in an action for redemption to furnish particulars of the amount claimed to be due on the mortgage (*k*). And if he admits his liability to be redeemed he is bound to state, in answer to interrogatories, not only the amount due, but also what securities he held for the debt (*l*).

Where the mortgage was made since the 31st of December, 1881, the mortgagor is entitled, so long as his right to redeem subsists, at his own cost, to inspect and take copies or abstracts of, or extracts from, the documents of title in the mortgagee's custody or power relating to the mortgaged property (*m*).

Production of title-deeds, &c.

In cases not falling within the above enactment, the mortgagee was not in general bound to produce the title deeds unless he was redeemed (*n*). Under special circumstances, however, the mortgagee has been ordered to produce the mortgage deed at the hearing for the purpose of proof, but not for any other purpose (*o*).

A mortgagee, who is ordered to produce a deed, must produce everything which depends upon it (*p*). Therefore, in a suit to set aside a conveyance of an equity of redemption, it was held that the defendant must with the deed produce a receipt for the mortgage money which he had obtained after the date of the conveyance.

(*g*) *Baker* v. *Wetton*, 14 Sim. 426.

(*h*) *Green* v. *Nicholls*, 4 L. J. Ch. 118.

(*i*) *Douglas* v. *Culverwell*, 4 De G. F. & J. 20. See *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196.

(*k*) *Bridgewater* v. *De Winton*, 33 L. J. Ch. 238.

(*l*) *West of England, &c. Bank* v. *Nicholls*, 6 Ch. D. 613; *Elmer* v. *Creasy*, L. R. 9 Ch. 69.

(*m*) 44 & 45 Vict. c. 41, s. 16.

(*n*) *Chichester* v. *Marquess of Donegal*, L. R. 5 Ch. 497.

(*o*) *Beaumont* v. *Foster*, 5 L. J. Ch. 4.

(*p*) *Jones* v. *Jones*, Kay, App. vi.

If a mortgagee plead the Statute of Limitations (*q*), he is in the same position as to the liability to produce his deeds as any other defendant who cannot shelter himself under a mortgage title.

If a mortgagee take a conveyance of the equity of redemption from a trustee with notice of the trust, he must produce the conveyance in a suit by the *cestuis que trust* for redemption, though one of the trusts was for sale (*r*). And a *cestui que trust* is entitled to inspect mortgages in which trust funds are invested, though the mortgagors object (*s*).

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SECTION V.

DECREE FOR REDEMPTION.

Ordinary form of decree.

i.—Form of Decree.—The ordinary form of judgment in a redemption action in its simplest form directs an account to be taken of what is due to the defendant under and by virtue of his mortgage, and for the costs of the action (such costs to be taxed, &c.), and that, upon the plaintiff paying the defendant what shall be certified to be due to him within six months, the defendant shall reconvey the mortgaged property free from incumbrances and deliver up all deeds, but that, in default of payment within the time fixed, the action shall be dismissed, with liberty to apply (*t*).

Declaration of right to redeem.

If the right to redeem is disputed, the judgment will be prefaced by a declaration, affirming the right to redeem. And the judgment may also declare, where necessary, the rights and priorities as well of the several incumbrancers as of any person who has paramount claims on the estate (*u*); and may further direct that the necessary accounts be taken in a particular manner, as, where necessary, that rests be made (*x*), and that the amount due from the mortgagee on account of his receipts

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(*q*) *Parkinson* v. *Chambers*, 1 K. & J. 72. And see *Jones* v. *Jones*, *sup.*

(*r*) *Smith* v. *Barnes*, L. R. 1 Eq. 65.

(*s*) *Gough* v. *Offley*, 5 De G. & S. 653.

(*t*) Seton (7th ed.), 1852. For form of decree for redemption of a mortgage of a pension, see *James* v. *Ellis*, 19 W. R. 319.

(*u*) *Jones* v. *Griffith*, 2 Coll. 207.

(*x*) See as to rests, *post*, Chap. LIV., Sect. V. (iv).

be applied first in payment of interest and then of the principal of the mortgage security (*y*).

Where in a redemption action the mortgagee fails to appear, and the mortgagor takes out a summons under r. 1 of Ord. XV., for proper accounts, the order must be restricted to accounts of the sum due by the mortgagor, and of the rents due by the mortgagee; the rest of the decree must be adjourned (*z*).

It may also be directed, in a proper case, that the amount due to each mortgagee in respect of his own debt be added to whatever he may have paid for the redemption of preceding incumbrancers, together with all sums to which the Court may consider him to be entitled for improvements, or payments made in respect, or for the protection, of his security or of the estate.

Time allowed for redemption.

The time allowed by the judgment for redemption is, as a general rule, six months, as in an action for foreclosure (*a*); but as in a redemption action the mortgagor takes the initiative, he may, under special circumstances, be put upon terms, as by being ordered to pay the estimated amount due for principal, interest, and costs into Court by a shorter date.

As a general rule, the time for payment will not be enlarged in a redemption action as in an action for foreclosure, unless special grounds for such indulgence are shown. The difference in principle between the two classes of cases is that the plaintiff in a redemption action comes into Court professing that his money is ready and asking for his estate in return, but a foreclosing mortgagee calls upon the Court to act against a person unwilling to pay (*b*). But where, by a *bonâ fide* mistake, a plaintiff in a redemption action failed to pay the money into Court by the time fixed, the Court extended the time so as to include the actual date of lodgment (*c*).

Effect of default.

If, accordingly, the mortgagor do not pay the sum due at the time appointed in the redemption suit, he will not be allowed to redeem, although he tender the money before the motion to dismiss the action (*d*), unless, as it seems, good cause is shown for the delay (*e*).

(*y*) See *Thorneycroft* v. *Crockett*, 2 H. L. C. 246.

(*z*) *Clover* v. *Wilts, &c. Soc.*, 53 L. J. Ch. 622.

(*a*) *Post*, Chap. XLIX., Sect. IV. (iii).

(*b*) *Moosielski* v. *Wakefield*, 17 Ves. 417; *Faulkner* v. *Bolton*, 7 Sim. 319.

(*c*) *Collinson* v. *Jeffery*, (1896) 1 Ch. 644.

(*d*) *Faulkner* v. *Bolton*, 7 Sim. 319.

(*e*) See *Jones* v. *Creswicke*, 9 Sim. 304.

But where in a redemption action an order was made giving leave to the plaintiff to lodge the mortgage moneys in Court, and directing that in default of such lodgment within two months from the date of the order, the action be dismissed; owing to a *bonâ fide* mistake of the plaintiff's solicitor this period was allowed to lapse, but the money was lodged within two months from the date on which the order was passed and entered: the Court extended the period allowed by the order so as to include the latter date (*f*).

Successive redemptions.

Redemption, where there are several parties entitled, will be decreed according to the priorities of the claimants; that is, if there are several mortgagees, the Court will decree in detail that the second shall redeem the first, the third the second, and so on (*g*).

Tenant for life and remainderman.

If the equity of redemption be limited to uses, the remainderman may bring his action to redeem (*h*); but he must give the first tenant for life and intermediate remaindermen an option of redeeming according to their priorities (*i*). The tenant for life has the first option to redeem; and if he procures an assignment of the mortgage, or if the mortgagee purchases the interest of the tenant for life, it seems that the remainderman cannot, without the consent of the tenant for life or his assignee, redeem the mortgage (*k*).

Contribution by tenant for life on redemption by remainderman.

The tenant for life can only be compelled to keep down the interest during his life (*l*); but if the tenant for life refuse to redeem, the remainderman may, by redeeming the mortgage and ejecting the tenant for life, and taking possession of the profits, or by bringing an action of foreclosure, compel the tenant for life to come in and contribute, or give up the possession of the estate (*m*).

It was formerly the rule that the tenant for life should pay one-third, and the remainderman two-thirds (*n*); and in one

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(*f*) *Collinson* v. *Jeffery*, (1896) 1 Ch. 644.

(*g*) *Archdeacon* v. *Bowes*, M'Cl. 149. And see *Ramsbottom* v. *Wallis*, 5 L. J. (N. S.) Ch. 92. See as to orders for successive redemptions and foreclosures, *post*, Chap. XLIX., Sect. IV. (iii).

(*h*) See *Corbett* v. *Barker*, 1 Anst. 138; 3 Anst. 755; and *ante*, p. 724.

(*i*) *Raffety* v. *King*, 1 Keen, 601, 618.

(*k*) *Raffety* v. *King*, *sup.*; *Ravald* v. *Russel*, Yo. 9, 21; *Prout* v. *Cock*, (1896) 2 Ch. 808.

(*l*) *Ante*, p. 661.

(*m*) *Hayes* v. *Hayes*, 1 Ch. Ca. 224; *Cornish* v. *Mew*, 1 Ch. Ca. 271; *Clyat* v. *Batteson*, 1 Vern. 404; *Ballett* v. *Sprainger*, Prec. Ch. 62; *Rowel* v. *Walley*, 1 Rep. in Ch. 116. And see 3 Anst. 757.

(*n*) *Rowel* v. *Walley*, 1 Rep. in Ch. 116.

case it was decreed that the tenant for life should contribute two-fifths, and the remainderman three-fifths (*o*). The usual course is a reference to chambers to ascertain the amount of contribution.

Redemption of annuity.

In an action for redemption of an annuity, the principle of the common order is applied (*p*).

Motion to dismiss action for redemption.

ii.—**Dismissal of Action for Redemption.**—The action for redemption will be dismissed on motion of course, upon production of the certificate of the amount due, and of an affidavit of attendance and non-payment of the money (*q*), even though after the time fixed for payment the mortgagor have tendered the principal and interest, with an additional sum for interest to the day of tender (*r*), unless under special circumstances (*s*). But it seems proper in such a case to move upon notice.

Effect of dismissal of action.

If the money be not duly paid and the redemption action be accordingly dismissed, the mortgagee thereupon becomes entitled to hold the estate free from the mortgage debt in respect of which default has been made. A final decree dismissing an action for the redemption of a legal mortgage is equivalent to a decree for foreclosure (*t*). But this rule does not apply to the dismissal of an action for the redemption of an equitable mortgage by deposit of title deeds (*u*); and the dismissal of a redemption action for want of prosecution has not the effect of a decree for foreclosure, but leaves the mortgagor at liberty to commence a fresh action for redemption (*x*).

Who bound by dismissal.

The dismissal of an order for redemption will bind not only the mortgagor and his heirs, but also a purchaser of the equity of redemption after commencement of the action (*y*), provided the action is duly registered as a *lis pendens* (*z*).

Where, pending a suit by a mortgagor for redemption, the plaintiff became insolvent, and his assignees were not made parties to the suit, it was held that the assignees were not bound

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(*o*) *James* v. *Hales*, 2 Vern. 268.

(*p*) *Moore* v. *Rowe*, and *Byne* v. *Vivian*, cited Seton (6th ed.), 2117.

(*q*) *Stuart* v. *Worrall*, 1 Bro. C. C. 581; *Proctor* v. *Oates*, 2 Atk. 140; *Newsham* v. *Gray*, 2 Atk. 287.

(*r*) *Faulkner* v. *Bolton*, 7 Sim. 319; the report in 4 L. J. Ch. 81 is incorrect.

(*s*) *Collinson* v. *Jeffery*, (1896) 1 Ch. 644.

(*t*) *Cholmley* v. *Oxford*, 2 Atk. 267; *Bishop of Winchester* v. *Paine*, 11 Ves. 194, 199; *Inman* v. *Wearing*, 3 De G. & S. 734; Ord. XVIII. r. 2.

(*u*) *Marshall* v. *Shrewsbury*, L. R. 10 Ch. 250.

(*x*) *Hansard* v. *Hardy*, 18 Ves. 460.

(*y*) *Garth* v. *Ward*, 2 Atk. 175.

(*z*) 2 & 3 Vict. c. 11, s. 7.

by the foreclosure occasioned by the dismissal of the mortgagor's bill to redeem, in consequence of his failing to pay the amount found due at the time appointed (*a*).

Dismissal of action by *puisne* mortgagee;

In an action by a second mortgagee to redeem a first mortgagee and foreclosure the mortgagor, the proper form of judgment is, that in default of the plaintiff redeeming, the action is to stand dismissed with costs (*b*).

—by surety.

Where one person has mortgaged his estate as a surety for another, the judgment is so framed as to give the surety the full benefit of his rights against the estate of the principal debtor, and the right of redemption being given to both, it is ordered that if the money be paid by the principal debtor, the estates shall be conveyed to their respective owners; but if the money be paid by the surety, both estates are conveyed to him, and he, of course, holds that which belongs to his principal, subject to redemption by him; if neither principal nor surety redeem, both their estates are foreclosed (*c*).

Dismissal of infant's action.

If the plaintiff be an infant, and bring his action to redeem, and a day is given for that purpose, and default made in payment, and the action consequently dismissed, it does not seem clear whether the infant will be bound, or will have six months after he comes of age to show cause (*d*).

Decree for redemption on terms.

The right of redemption being a creature of equity must be subject to the rules of equity. The Court, therefore, will make terms with the mortgagor, if necessary, before it permits him to redeem; and the decree for redemption will be either absolute or conditional, as suits the circumstances of the case. Of this, an instance occurs (*e*) in which a mortgagee having purchased the estate for a valuable consideration, a third party made adverse claim to the right of redemption, but was desirous of having the validity of the mortgage tried at law before he should redeem: the Court held that he ought to declare whether he would redeem or not before he disputed the title, and that if he would redeem he ought to pay the defendant all his principal money, damages, and costs, which he refusing, the Court dismissed the bill: and in

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(*a*) *Wood* v. *Surr*, 19 Beav. 551.

(*b*) *Hallett* v. *Furze*, 31 Ch. D. 312.

(*c*) *Beckett* v. *Micklethwaite*, 6 Madd. 199; *Aldworth* v. *Robinson*, 2 Beav. 287.

(*d*) See *Gregory* v. *Molesworth*, 3 Atk. 625; *Napier* v. *Effingham*, 2 P. Wms. 401. As to the right of an infant defendant to a foreclosure action to a day to show cause, see *post*, Chap. XLIX., Sect. VI. (i).

(*e*) *Smith* v. *Valence*, 1 Rep. in Ch. 90. And see *Goodtitle* v. *Bailey*, Cowp. 601.

Chap. XXXVIII. § 5 (ii.)

another case (*f*), in which an infant heir of a mortgagor, by his guardian, having fruitlessly endeavoured by proceedings at law to overthrow the mortgagee's title, brought his bill to redeem, the Court would not allow redemption, unless the mortgagor would pay a sum of money which the mortgagee, on his oath, declared he had paid above his taxed costs in defending the title at law, and the Court also allowed him his costs of taking out administration to the mortgagor as principal creditor.

Dismissal of action where several incumbrancers.

Where there are several incumbrancers, and the mortgagor's action for redemption is dismissed, the last incumbrancer becomes *quasi* mortgagor, and the others become first and subsequent incumbrancers according to their priorities (*g*).

Conduct of sale.

iii.—Order for Sale in lieu of Redemption.—The conduct of a sale is always in the discretion of the Court, but, in a redemption action where a sale is prayed, it seems that the conduct will be given to the plaintiff, on the ground that he is more interested in obtaining the best price for the property (*h*). The sale may be ordered to be made out of Court (*i*); a reserve price may be fixed to cover the amount due on incumbrances; and the plaintiff may be ordered to give security for the costs of the sale (*k*).

Trustee Act, 1893, s. 30.

By sect. 30 of the Trustee Act, 1893 (*l*), it is enacted as follows:—

Vesting order consequential on judgment for sale or mortgage of land.

"Where any Court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land or entitled to a contingent right therein [as heir, or under the will of a deceased person for payment of whose debts the judgment was given or order made], and is a party to the action or proceeding in which the judgment or order is given or made, or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagee or in any other person."

This section virtually re-enacts (*m*) the repealed provisions

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(*f*) *Ramsden* v. *Langley*, 2 Vern. 536.

(*g*) *Cottingham* v. *Earl of Shrewsbury*, 3 Ha. 637.

(*h*) *Brewer* v. *Square*, (1892) 2 Ch. 111.

(*i*) *Davies* v. *Wright*, 32 Ch. D. 220 (foreclosure action); *Brewer* v. *Square*, *sup.*

(*k*) *Woolley* v. *Colman*, 21 Ch. D. 169; *Brewer* v. *Square*, *sup.*

(*l*) 56 & 57 Vict. c. 53. The words in brackets are repealed by Trustee Act, 1894, s. 1.

(*m*) The only material variations are: (1) that the power to make contained in sect. 29 of the Trustee Act, 1850 (*n*), and sect. 1 of the Trustee Act, 1852 (*o*).

The power of the Court to make vesting orders is not confined to cases of persons under disability (*p*), it extends to the case of a person of unsound mind, but not found lunatic (*q*).

Where an order directing a mortgage is made without jurisdiction a vesting order under this section cannot be made (*r*).

Where property is sold in lots, the purchasers may apply for a vesting order, and the costs of each purchaser will be paid out of the proceeds of his particular lot, not out of the fund in Court generally (*s*).

Formerly, applications under the Trustee Acts had to be made by petition, but such applications may now be made by summons in Chambers (*t*).

iv.—Costs.—In a suit for redemption, the plaintiff pays his own costs, and the defendant adds his to his mortgage debt (*u*).

The mortgagee is entitled to the costs of action, and to all costs properly incurred by him in reference to the mortgaged property, or the recovery of the mortgage debt, or otherwise relating to questions between him and the mortgagor (*x*).

In the decree for redemption, the costs of a prior foreclosure suit must be provided for (*y*).

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vesting orders is given to the High Court generally, and not only to courts of equity; and (2) that the power is extended to cases where the Court orders a mortgage.

(*n*) 13 & 14 Vict. c. 60.

(*o*) 15 & 16 Vict. c. 55.

(*p*) *Beckett* v. *Sutton*, 19 Ch. D. 646.

(*q*) *Herring* v. *Clark*, L. R. 4 Ch. 167.

(*r*) *Re Hambrough*, (1909) 2 Ch. 620.

(*s*) *Ayles* v. *Cox*, 17 Beav. 504.

(*t*) Ord. LV. r. 2 (8).

(*u*) The question as to what costs are allowed to a mortgagee will be considered fully, *post*, Chap. LIV., Sect. IV.

(*x*) *National Provincial Bank* v. *Games*, 31 Ch. D. 582. See *Wales* v. *Carr*, (1902) 1 Ch. 860.

(*y*) *Ainsworth* v. *Roe*, 14 Jur. 874.

CHAPTER XXXIX.

STATUTES OF LIMITATION IN BAR OF REDEMPTION.

Statutory limit to entry on lands under statute of Jac. I.

i.—Application of the Statutes to Claims for Redemption.— The statute 21 Jac. I. c. 16, s. 1, enacted that no entry into any lands, tenements, or hereditaments should be made but within twenty years after the right or title to the same should accrue or descend. This section was superseded by the statute 3 & 4 Will. IV. c. 27, and was ultimately repealed by the Statute Law Revision Act, 1863.

Analogous principles adopted in equity.

The older statute did not affect claims which could only be brought in a Court of Equity (*a*). But even prior to the statute 3 & 4 Will. IV. c. 27, the time within which the equity of redemption of land or rents would be allowed was a matter for consideration; and after considerable conflict of opinion, it was settled that the Courts of Equity would be regulated in this respect by analogy to the old Statute of Limitations, and that after twenty years' abandonment by the mortgagor (*b*), the right of redemption should be lost, unless the mortgagor could bring his case within one of the exceptions mentioned in that statute, namely, imprisonment, infancy, coverture (*c*), or being beyond the seas (not having absconded), or non-sane memory; in any one of which cases, the Courts, by further analogy to that statute, gave ten years after the disability was removed (*d*). But if the time once began to run, a subsequent legal disability, by analogy to the decisions at law, would not have been sufficient to stop it (*e*).

(*a*) *Bonney* v. *Ridgard*, 1 Cox, 149.

(*b*) *Corbett* v. *Barker*, 1 Anst. 138; 3 Anst. 755; *Bonney* v. *Ridgard*, *sup.*; *Hovenden* v. *Lord Annesley*, 2 Sch. & L. 636; *Marquis Cholmondeley* v. *Lord Clinton*, 2 J. & W. 191; *Harrison* v. *Hollins*, 1 S. & St. 471.

(*c*) *Price* v. *Copner*, 1 S. & St. 347.

(*d*) *White* v. *Ewer*, 2 Vent. 340; *Belch* v. *Harvey*, 3 P. Wms. 287, n.

(*e*) *Floyd* v. *Mansel*, Gilb. Eq. Rep. 185; *St. John* v. *Turner*, 2 Vern. 418; *Knowles* v. *Spence*, Mos. 225; 1 Eq. Ca. Abr. 315, pl. 5; *Corbett* v. *Barker*, 1 Anst. 138.

Stat. 3 & 4 Will. IV. c. 27, s. 28.

By the statute 3 & 4 Will. IV. c. 27, s. 28, the law on this subject was made clear and precise, and the period within which suits for redemption of mortgaged lands or rents must be brought was fixed at twenty years next after the mortgagee took possession, or from the last written acknowledgment of the mortgagor's title or of his right to redemption.

Repeal.

This section has been repealed by the Real Property Limitation Act, 1874 (*f*); but its provisions have been substantially re-enacted, the general period of redemption being reduced to twelve years.

No statutory limit to suits for redemption of mortgaged personalty.

As regards the redemption of mortgages of personalty other than leaseholds, the Statutes of Limitation have no direct application. The statutes 3 & 4 Will. IV. c. 27, s. 28, and 37 & 38 Vict. c. 57, s. 7, apply only to land and rents; and there is no similar provision in any Statute of Limitation with reference to personal property (*g*). The statute 21 Jac. I. c. 16, s. 3, does indeed bar claims after six years to (among other actions) an action for account, and it might be said that a suit for redemption necessarily involves a claim for an account from the mortgagee in possession. But in this statute, the term "action" must be strictly construed as meaning an action at law (*h*); and the Judicature Acts did not alter or touch the Statutes of Limitation at all, and these statutes still apply to the circumstances which constituted the actions named in it (*i*). It is obvious that the circumstances of a mortgage transaction would not have supported an action for account at common law under the former practice, and therefore the Act of Jac. I. does not apply, and consequently there is no statutory limitation of time within which a claim must be brought to redeem mortgaged personalty other than leaseholds.

Analogy of principle of statute of Jac. I. not applied.

But the Court has, in several recent cases, recognized and applied, with respect to equitable claims to personalty, the principle that where there is a remedy in equity corresponding or analogous to a remedy at law, which is subject by statute to a limit in point of time, equity will act by analogy to the statute, and impose on the remedy it affords a similar limit (*k*). It

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(*f*) 37 & 38 Vict. c. 57, s. 9.

(*g*) See *London and Midland Bank* v. *Mitchell*, (1899) 2 Ch. 161.

(*h*) See, per Jessel, M.R., in *Re Greaves, Bray* v. *Tofield*, 18 Ch. D. 551, at p. 554.

(*i*) Per Brett, L.J., in *Gibbs* v. *Guild*, 9 Q. B. D. 59, C. A., at p. 67. See *Re Sharpe, Masonic, &c. Ass. Co.* v. *Sharpe*, (1892) 1 Ch. 154, C. A., at p. 167.

(*k*) *Knox* v. *Gye*, L. R. 5 H. L.

seems, however, that the analogy does not apply to an action to redeem mortgaged personalty other than leaseholds, and consequently such an action is not barred after six years (*l*).

Mortgagors to be barred at end of twelve years from the time when the mortgagees took possession, or from the last written acknowledgment.

ii.—Bar of Actions for Redemption after Twelve Years' Possession.—By the Real Property Limitation Act, 1874, it is enacted as follows:—

> Sect. 7. "When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgments, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage

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674; *Peek* v. *Gurney*, L. R. 6 H. L. 377; *Rule* v. *Jewell*, 18 Ch. D. 667; *Re Hastings, Hastings* v. *Hastings*, 35 Ch. D. 105, C. A.; *Allcard* v. *Skinner*, 36 Ch. D. 186, C. A.; *Beck* v. *Pierce*, 23 Q. B. D. 322, C. A.

(*l*) *London and Midland Bank* v. *Mitchell*, (1899) 2 Ch. 161.

money, as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage."

Definitions.

Sect. 1 of the statute 3 & 4 Will. IV. c. 27, contains definitions of expressions used in the Act, such as "land," "rent," "person through whom another person is said to claim," &c.

"Rent."

The expression "rent" includes quit rents (*m*), and also tithe rent-charge (*n*).

Trusts for sale.

A trust for sale of land as a security for money lent is a mortgage within this section, and not an express trust within the meaning of the 25th section of the statute (*o*).

Express power to redeem beyond statutory period.

In *Alderson* v. *White* (*p*), Lord Cranworth said that he was disposed to think that the statute could not apply so as to make the mere possession by the mortgagee for twenty years without acknowledgment a bar to redemption where the original contract was that the mortgagor may redeem at any time during the period extending beyond the twenty (now twelve) years; but the determination of this question was unnecessary in the case referred to, as the instrument in question was held to be a conditional sale, and not a mortgage.

Welsh mortgage.

It has been seen (*q*) that in the case of a Welsh mortgage it is of the essence of the contract that the mortgagee shall hold possession of the land until the mortgage is fully satisfied. Accordingly, it has been held that no time would bar the redemption of a Welsh mortgage (*r*), or of a mortgage where the deed contained an agreement that the mortgagee should hold until the mortgage was satisfied (*s*), unless on an account taken of the rents and profits it appeared that the mortgagee had been in possession upwards of twenty years since the mortgage debt was fully paid (*t*). But a plaintiff who seeks to redeem a mortgage alleged to be of this nature after many years must prove his case clearly and indefeasibly (*u*).

(*m*) *De Beauvoir* v. *Owen*, 5 Exch. 166; *Lord Chichester* v. *Hall*, 17 L. T. 121.

(*n*) *Irish Land Commission* v. *Grant*, 10 App. Ca. 14.

(*o*) *Locking* v. *Parker*, L. R. 8 Ch. 30; *Re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284, C. A. And see *Kirkwood* v. *Thompson*, 2 H. & M. 392; *Bennett* v. *Cooper*, 9 Beav. 252.

(*p*) 2 De G. & J. 97, 109.

(*q*) *Ante*, p. 32.

(*r*) *Howel* v. *Price*, 1 P. Wms. 291.

(*s*) *Orde* v. *Heming*, 1 Vern. 418; *Yates* v. *Hambly*, 2 Atk. 360.

(*t*) *Yates* v. *Hambly*, *sup.* See *Walters* v. *Webb*, L. R. 5 Ch. 533. And see *Fenwick* v. *Reed*, 1 Mer. 125; and *ante*, p. 33.

(*u*) *Sevvaji* v. *Chinna*, 10 Moo. I. A. 151.

Mortgagee in possession of part.

Where a mortgagee has been in undisturbed possession of part of the land comprised in the mortgage for the statutory period, the mortgagor's right to redeem that part is barred, though he held possession of the remainder of the land (*x*). The rule before the statute of Will. IV. was different (*y*).

Land and policy included in one mortgage.

Where real property and a policy of insurance are included in one mortgage to secure one debt and subject to one proviso for redemption, and the right of the mortgagor to redeem the land has become barred by statute, the right to redeem the policy will also be barred, not by analogy to the statute, but because it having become impossible for the mortgagor to require a reconveyance of the land, it is equally impossible to require a re-assignment of the policy, the land and policy together constituting one security for the debt (*z*).

Time will not run till default.

Time will not run in the case of a mortgage until the day of redemption has arrived, for the mortgagor cannot redeem before that day (*a*). This proposition, however, must be accepted with caution, having regard to the Real Property Limitation Act, 1874, s. 7, which provides that time runs from the mortgagee's taking possession (*b*).

If, therefore, the twelve years from taking possession expired before the debt was fully payable, the mortgagor would be barred. But, *quære*, whether the mortgagor's right to the surplus would be barred if the debt was fully satisfied before the twelve years had expired (*c*).

Possession must be of same person or of those claiming under him.

In order to bar a right to bring an action for redemption of land, the possession of twelve years must be of the same person or of several persons claiming one from or under the other by conveyance, will, or descent (*d*).

So, where a mortgagor's solicitor, out of his own moneys, paid off the mortgage debt due from his client, without taking any assignment of the debt and the security for the same, and received the rents and profits, it was held that he must be taken to have acted as agent of the mortgagor, and that the possession

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(*x*) *Kinsman* v. *Rouse*, 17 Ch. D. 104.

(*y*) *Rakestraw* v. *Brewer*, 2 P. Wms. 511; *Burke* v. *Lynch*, 2 Ba. & Be. 426.

(*z*) *Charter* v. *Watson*, (1899) 1 Ch. 175.

(*a*) *Brown* v. *Cole*, 14 Sim. 427. See *ante*, p. 732.

(*b*) *Re Metropolis, &c. Bldg. Soc.*, (1911) 1 Ch. 698.

(*c*) *Ibid.*

(*d*) *Doe* v. *Barnard*, 13 Q. B. 952.

must be taken to be that of the mortgagor, so that time would not run against him (*e*).

Possession bars all claiming under mortgagor.

Conversely, the statute will apply not only as against the mortgagor, but as against all persons claiming under him. So, if a person by his will devises his lands in settlement, and then mortgages the lands, the statutory period will run from the time when the mortgagee enters into possession against the mortgagor himself and his successive devisees (*f*).

Mortgagee in possession under another title.

Time will not run against the mortgagor under this Act, as it did not under the old law, during the time that the mortgagee is in possession under some other rightful title; as where the mortgagee, after being seven years in possession without acknowledgment, purchased the estate of the tenant for life who had joined with the remainderman in making the mortgage (*g*), or the estate of a tenant by the curtesy or otherwise, whether he acquired the interest before (*h*) or after (*i*) taking possession.

Possession after presumed death of tenant for life.

Where a mortgagee of a life estate is in possession under an order of Court, and remains in possession after the death of the tenant for life has been presumed, he is not a trespasser, and the statute does not run in his favour (*k*); and the persons claiming in remainder are guilty of no laches in not suing till the expiration of seven years from the time when the tenant for life was last heard of; but as no fiduciary relation existed between them and the mortgagee, they were only entitled to an account of rents for six years (*l*).

Joint possession of husband and wife.

So where the equity of redemption was vested in the husband and wife jointly, and they conveyed by deed without fine to a mortgagee, the mortgagee's estate could only become absolute if the husband survived, and, the wife having survived, her heir was entitled to claim within twenty years from the death of the husband (*m*).

Possession of husband as mortgagee.

Where a husband, separated from his wife, became mortgagee of her separate estate, and continued in possession for over twenty

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(*e*) *Ward* v. *Carttar*, L. R. 1 Eq. 29.

(*f*) *Browne* v. *Bishop of Cork*, 1 Dr. & Wal. 700. See *Raffety* v. *King*, 1 Keen, 601.

(*g*) *Hyde* v. *Dallaway*, 2 Ha. 528. And see *Ravald* v. *Russell*, Y. 9; *Raffety* v. *King*, 1 Keen, 601, 616, 617; *Corbett* v. *Barker*, 3 Anst. 755; *Reeve* v. *Hicks*, 2 S. & St. 403.

(*h*) *Raffety* v. *King*, 1 Keen, 601.

(*i*) *Hyde* v. *Dallaway*, 2 Ha. 528.

(*k*) *Hickman* v. *Upsall*, 2 Ch. D. 617.

(*l*) *S. C.*, 4 Ch. D. 145, C. A.

(*m*) *Price* v. *Copner*, 1 S. & St. 347, *sed qu.*

years, it was held that the wife's right to redeem was not barred by the statute (*n*).

Where several persons are successively entitled to equity of redemption.

It was held that time would run against the remainderman, notwithstanding the neglect of persons with the prior estate. The antiquity of the defendant's possession is more to be regarded than the novel accruer of the plaintiff's title (*o*). So, in *Harrison* v. *Hollins* (*p*), it was decided that the equity of redemption would be barred by twenty years' non-claim, although the mortgagee entered into possession in the lifetime of a person who was entitled to the equity of redemption as tenant for life only, and although the person entitled to the equitable estate in remainder filed his bill within five years after the death of the tenant for life. And it was also held that if the mortgagee entered into possession not in his character of mortgagee only, but as purchaser of the equity of redemption, he was bound to look to the title of his vendor, and if he only acquired a life interest in fact, he was bound to keep down the interest for the benefit of the remaindermen, and the time did not run against the remaindermen during the continuance of the life estate (*q*), although the estate of the tenant for life had been enlarged by a tortious conveyance (*r*).

On a similar ground, relief has been given to a remainderman, on coming into possession, against a sale under a decree of the Court, fraudulently obtained by collusion between the mortgagees, the tenant for life, and the purchaser, by permitting the remainderman to redeem after a lapse of thirty-five years (*s*). So where during the possession there was a tenancy by the curtesy (*t*).

Disabilities.

There is in the Acts now in force no express saving of disabilities of the mortgagor or his heirs in any distinct clause; they were saved under the old Statute of Limitations (*u*); but it has been held that sect. 16 of the Act of Will. IV. as to dis-

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(*n*) *Booth* v. *Passer*, 1 Ir. Eq. R. 33. See *Re Dixon, Heynes* v. *D.*, (1900) 2 Ch. 561, C. A.

(*o*) *Ashton* v. *Milne*, 6 Sim. 369; *Cholmondeley* v. *Clinton*, 4 Bli. 1.

(*p*) 1 S. & St. 471. And see *Foster* v. *Blake*, 4 Bli. 140.

(*q*) *Raffety* v. *King*, 1 Keen, 601; *Mills* v. *Borthwick*, 11 Jur. N. S. 558; *Burrowes* v. *Gore*, 6 H. L. C. 907; *Hawkins* v. *Gardiner*, 2 Sm. & G. 441.

(*r*) *Lewis* v. *Rees*, 3 K. & J. 132; *Mills* v. *Capel*, L. R. 20 Eq. 692.

(*s*) *Earl of Bandon* v. *Becher*, 3 Cl. & F. 479. And see *Gore* v. *Stackpool*, 1 Dow, 18; *Bennett* v. *Colley*, 2 My. & K. 225; *Fausset* v. *Carpenter*, 2 Dow & C. 232; *Thornhill* v. *Glover*, 3 Dr. & War. 195; *Bowen* v. *Evans*, 2 H. L. C. 257.

(*t*) *Anon.*, 2 Atk. 333.

(*u*) *Proctor* v. *Oates*, 2 Atk. 140; *Anon.*, 3 Atk. 313; *Jenner* v. *Tracy*, 3 P. Wms. 287, n.; *Bonny* v. *Ridgard*, cited 17 Ves. 99.

abilities does not apply to a mortgagor redeeming, inasmuch as an action for redemption is not an action to recover land for the purposes of the Statutes of Limitation (*x*).

Fraud, &c.

There may, however, be circumstances which might be held to take the case out of the statute: for instance, if there was fraud or oppression in the transaction (*y*), or if the mortgagee used unfair means to clog the redemption of the mortgage (*z*), or the like.

Concealed fraud.

The provisions of sect. 26 of the statute 3 & 4 Will. IV. c. 27, save the rights of persons to bring suits for the recovery of land of which they have been deprived by concealed fraud (*a*); but, *quære,* whether, for the reason stated above, these provisions apply to cases of redemption.

Mistake.

Possession taken under a mistake, though by consent of the real owner, is not the less effectual in barring his rights if the person in possession has no duty to perform (*b*).

Sect. 34 of Act of Will. IV. as to extinguishment does not apply.

Sect. 34 of the Act of Will. IV., providing that at the end of the period of limitation the right of the party out of possession is to be extinguished, is expressly limited to actions for recovery of lands, rents and advowsons, and, consequently, does not appear to apply to redemptions (*c*).

But mortgagee obtains a good title.

It has, however, been held that after the period has elapsed the mortgagee, or the trustee (if the security is by way of trust for sale) may sell under his power or trust, and make a good title, and convey to a purchaser, and the mortgagor will have no right to the surplus proceeds of the sale (*d*); and if the mortgagor brings an action to redeem, the mortgagee will be entitled to raise the statutory bar by his pleadings (*e*).

Where the trustee in bankruptcy is barred by the Statute of Limitations, the bankrupt, notwithstanding the annulment of the bankruptcy, is barred also (*f*).

Trustees.

Where redemption is barred by the statute and trustees hold the land freed from the equity of redemption, the Conveyanc-

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(*x*) Per Jessel, M.R., in *Kinsman* v. *Rouse,* 17 Ch. D. 104, at p. 107. See *Forster* v. *Patterson,* 17 Ch. D. 132.

(*y*) *Spurgeon* v. *Collier,* 1 Ed. 55.

(*z*) *Ord* v. *Smith,* Sel. Ca. in Ch. 9.

(*a*) Set out *post,* p. 1110.

(*b*) *Cholmondeley* v. *Clinton,* 4 Bli. 1.

(*c*) See 17 Ch. D. at p. 107.

(*d*) *Re Alison, Johnson* v. *Mounsey,* 11 Ch. D. 284, C. A.; *Chapman* v. *Corpe,* 41 L. T. 22. See *Re Metropolis, &c. Bldg. Soc.,* (1911) 1 Ch. 698.

(*e*) *Ante,* p. 759.

(*f*) *Markwick* v. *Hardingham,* 15 Ch. D. 339, C. A.

ing Act, 1911 (*g*) provides that they shall hold it on trust for sale with power to postpone and apply the proceeds as therein mentioned.

Acknowledgment before statute 3 & 4 Will. IV. c. 27.

iii.—What Acknowledgment is sufficient to keep alive the Right of Redemption.—Before the statute 3 & 4 Will. IV. c. 27, any act of a mortgagee of lands acknowledging the mortgage as subsisting would have saved the mortgagor's right of redemption (*h*). Such an acknowledgment might be proved by any clear and unimpeachable evidence by parol or otherwise (*i*). The statute now requires the acknowledgment to be in writing. As neither that statute nor the statute 37 & 38 Vict. c. 57, affects mortgages of personalty, other than leaseholds, it would seem that the rules as to acknowledgment laid down in the earlier decisions are still applicable to such mortgages, so as to require a brief consideration in this place.

What amounted to such acknowledgment.

An acknowledgment, so as to save the equity of redemption, need not have been made in a transaction between the mortgagee and the mortgagor, or their representatives. So a conveyance by way of sale, security, or settlement of the lands expressed to be made subject to the mortgage would be a clear acknowledgment, though the mortgagor was not a party to the deed (*k*). So also if the mortgagee devised the property as his "mortgaged estate," or subject to the mortgage (*l*), or if he alluded to it as subsisting by recital or otherwise in a deed or will (*m*), there would be sufficient evidence of acknowledgment. It is said, however, that a conveyance of the property subject to the subsisting equity of redemption, "if any," would not be sufficient (*n*).

Accounts of mortgagee.

The equity of redemption would be saved by an account kept with the mortgagor or his representatives (*o*), or even by a private account kept by a mortgagee of the profits of the estate in which he treated the property as redeemable (*p*). But an

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(*g*) 1 & 2 Geo. V. c. 37, s. 9, set out *post*, Chap. XLIX., Sect. I. (i).

(*h*) *Hodle* v. *Healey*, 1 V. & B. 536; *Price* v. *Copner*, 1 S. & St. 347; *Cutler* v. *Cremer*, 1 L. J. Ch. 108.

(*i*) *Whiting* v. *White*, 2 Cox, 295; G. Coop. 1; *Reeks* v. *Postlethwaite*, G. Coop. 161.

(*k*) *Smart* v. *Hunt*, 4 Ves. 478, n.; *Perry* v. *Marston*, 2 Bro. C. C. 399; *Hansard* v. *Hardy*, 18 Ves. 455.

(*l*) *Anon.*, 3 Atk. 313.

(*m*) *Ord* v. *Smith*, Sel. Ca. Ch. 9; *Price* v. *Copner*, 1 S. & St. 347.

(*n*) *Hardy* v. *Reeves*, 4 Ves. 466, 480.

(*o*) *Procter* v. *Cowper*, 2 Vern. 377; *Anon.*, 2 Atk. 333.

(*p*) *Fairfax* v. *Montague*, cited 2 Ves. Jun. 84; *Campbell* v. *Beckford*, account or other acknowledgment given by an agent of the mortgagee without his authority would not keep alive the right (*q*).

The case was taken out of the statute if the mortgagee submitted to be redeemed (*r*); or if the mortgagor, or his heir, remained in possession of any part of the estate (*s*); or if the time was otherwise well accounted for, as in a case in which it appeared that there had been a promise that the mortgagor should be at liberty to redeem after twenty-seven years, where redemption was allowed after forty-one years, being only fourteen years from the time allowed (*t*); and as in another case (*u*), in which redemption was allowed fifty years after the mortgage, the time being accounted for by legal proceedings. If, however, a mortgagor filed his bill to redeem, and obtained a decree to account, he must have prosecuted his suit, or in twenty years he would be barred (*x*).

Parol evidence admissible.

Parol evidence was admissible to affect the mortgagee, but it must have been clear and unimpeachable (*y*). Even if the equity of redemption was actually released by the mortgagor to the mortgagee, evidence would be admitted that the release was made upon a secret trust for his benefit (*z*), or that it was not intended to be an absolute sale (*a*).

Redemption was allowed after forty years' possession, on evidence of a contract entered into within seven years preceding the filing of the bill, by the heir of the mortgagee, for purchase of the equity of redemption (*b*).

Acknowledgment under statute 3 & 4 Will. IV. c. 27, s. 28.

In order to take a case out of the operation of the statutes now in force, so as to preserve the right of redemption, notwithstanding possession by the mortgagee, sect. 28 of the Act of Will. IV. requires that an acknowledgment must in the meantime have been given of the title of the mortgagor, or of his right to redemption to the mortgagor, or to some person claiming his estate, or to the agent of such mortgagor or person, in

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cited 4 Ves. 474; *Lake* v. *Thomas*, 3 Ves. 17—22.

(*q*) *Barron* v. *Martin*, G. Coop. 189.

(*r*) *Proctor* v. *Oates*, 2 Atk. 140.

(*s*) *Rakestraw* v. *Brewer*, 2 P. Wms. 511; *Burke* v. *Lynch*, 2 Ba. & Be. 426. And see 2 Ba. & Be. 573.

(*t*) *White* v. *Pigeon*, Tothill, tit. 102, p. 135.

(*u*) *Palmer* v. *Jackson*, 5 Bro. P. C. 281.

(*x*) *St. John* v. *Turner*, 2 Vern. 418.

(*y*) *Whiting* v. *White*, 2 Cox, 295.

(*z*) *Morley* v. *Elways*, 1 Ch. Ca. 107.

(*a*) *Vernon* v. *Bethell*, 2 Ed. 110.

(*b*) *Conway* v. *Shrimpton*, 5 Bro. P. C. 187.

writing signed by the mortgagee or some person claiming through him.

Acknowledgment after expiration of statutory period.

It was held under the statute of Jac. I. that an acknowledgment made after twenty years' possession by the mortgagee would revive the mortgage and restore the equity of redemption (*c*). The correctness of this decision has, however, been doubted (*d*), and appears to be no longer law (*e*). According to the express language of sect. 28, a case does not come within the exception unless the acknowledgment is given "in the meantime," which would seem to be capable of no other construction than as meaning within twelve years after the mortgagee entered into possession. This question is not affected by the decisions on extinguishment of title under sect. 34 (*f*), inasmuch as that section applies only to entries and actions for recovery of land, and it has been seen that an action for redemption is not an action to recover land for the purposes of the Statute of Limitations (*g*).

To whom the acknowledgment must be given.

The acknowledgment must be made to the mortgagor or those claiming under him, or the agent of one of such persons.

An acknowledgment of the mortgagor's title by a recital in an assignment of the mortgage, but to which the mortgagor is not a party, is not sufficient to stop the statute from running (*h*). But it seems to be otherwise if the mortgagor is a party (*i*). An acknowledgment made to the tenant by the curtesy, of the right of the heir, has, however, been held to be sufficient, as being made to an agent, though the acknowledgment would otherwise seem to have been sufficient, as being made to the particular tenant of the equity of redemption (*k*).

An acknowledgment to a bankrupt is not sufficient, as the bankrupt is not the agent of his trustee unless there be evidence of agency (*l*).

A letter written by a mortgagee to his own solicitor would not amount to an acknowledgment (*m*).

(*c*) *Pendleton* v. *Booth*, 1 De G. F. & J. 81; *Stansfield* v. *Hobson*, 3 De G. M. & G. 620.

(*d*) *Markwick* v. *Hardingham*, 15 Ch. D. 339, at p. 346, C. A. See *Brassington* v. *Llewellyn*, 27 L. J. Ex. 297. See also the cases cited on the similar phrase in sect. 40 of 3 & 4 Will. IV. c. 27, *post*, Chap. XLVIII., Sect. V.

(*e*) *Sanders* v. *Sanders*, 19 Ch. D. 371, a decision under sect. 14.

(*f*) See *post*, Chap. L., Sect. X.

(*g*) See *ante*, p. 775.

(*h*) *Lucas* v. *Dennison*, 13 Sim. 584.

(*i*) See *Batchelor* v. *Middleton*, 6 Ha. 75.

(*k*) *Trulock* v. *Robey*, 12 Sim. 402.

(*l*) *Markwick* v. *Hardingham*, 15 Ch. D. 339, 352, C. A.

(*m*) *Stansfield* v. *Hobson*, 3 De G. M. & G. 620.

Acknowledgment must be in writing.

Formerly, as has been seen (*n*), a parol acknowledgment would have been sufficient to keep alive the equity of redemption, but now the acknowledgment must be in writing signed by the mortgagee or some person claiming under him.

What acknowledgment is sufficient.

Whatever expressions made by parol would have amounted before the statute to an acknowledgment, will still be sufficient if in writing, and if the other requirements of the statute are duly complied with (*o*). Any expression, therefore, referring to the estate as mortgaged, or to the person entitled to the equity of redemption, and expressing a readiness to settle the account, or referring to a proposed arrangement for accounting or for paying off the mortgage debt, will be a sufficient acknowledgment.

No particular form is necessary, nor need the amount be stated (*p*), nor need it amount to a new promise to pay (*pp*).

The acknowledgment may be by affidavit in an action (*q*); in a schedule (*q*); or by an answer to interrogatories (*q*); but not by an affidavit for probate (*qq*).

Acknowledgment must be explicit.

The acknowledgment must, however, amount to a clear and unequivocal admission that the mortgagee holds under a mortgage title (*r*). A letter denying the right of redemption claimed, but stating that, even if the mortgagor were entitled to redeem, he would derive no benefit from the account, was held to be insufficient (*s*).

Accounts.

The fact of the mortgagee treating himself as mortgagee and accounting, but without any signature of the accounts according to the Act, is not sufficient (*t*); so the annual statutory accounts of a building society do not amount to an acknowledgment (*u*).

It has been said that the commencement of an action of foreclosure does not fall within the Act; but under the old practice the mere filing of a bill for foreclosure was sufficient, though service might not have been effected till long after-

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(*n*) *Ante*, p. 776.

(*o*) *Stansfield* v. *Hobson*, 3 De G. M. & G. 620.

(*p*) *Trulock* v. *Robey*, 12 Sim. 402; *Lord St. John* v. *Boughton*, 9 Sim. 219; *Prance* v. *Sympson*, Kay, 678.

(*pp*) *Re Lacey*, (1907) 1 Ch. at p. 345.

(*q*) *Blair* v. *Nugent*, 3 J. & L. 658. See Carson, R. P. Stat. 195.

(*qq*) *Re Beavan*, (1912) 1 Ch. 196 (under Act of 1623).

(*r*) *Whiting* v. *White*, G. Coop. 1; *Reeks* v. *Postlethwaite*, G. Coop. 161; *Barron* v. *Martin*, G. Coop. 189.

(*s*) *Thompson* v. *Bowyer*, 9 Jur. N. S. 863. See *Kessisoglu* v. *Balli*, 47 S. J. 738.

(*t*) *Ibid.*; *Baker* v. *Wetton*, 14 Sim. 426.

(*u*) *Re Metropolis, &c. Bldg. Soc.*, (1911) 1 Ch. 698.

wards (*y*). A mere demand without process will not suffice (*z*).

Promise to pay balance of account.

A promise to pay the balance of an original debt which may be found to be due upon taking an account is a sufficient promise to take a case out of the statute (*a*).

Acknowledgment by agent of mortgagee.

Under sect. 28 no force is given to an acknowledgment by an agent of the mortgagee, which seems to stand on the same footing as under another statute (*b*), whereby an acknowledgment of a debt must be made in writing signed by the party chargeable therewith. Under that statute it has been held that the signature of an agent of the debtor was not sufficient (*c*); but now, in cases falling within that statute, an acknowledgment by an agent is rendered sufficient by sect. 13 of the statute 19 & 20 Vict. c. 97.

Joint mortgagees.

Where there is a mortgage to several jointly, there must be an acknowledgment by all the joint tenants (*d*).

(*y*) *Coppin* v. *Gray*, 1 Y. & C. C. C. 205; *Purcell* v. *Blennerhassett*, 3 J. & L. 24; *Forster* v. *Thompson*, 4 Dr. & War. 303; *Hele* v. *Lord Bexley*, 20 Beav. 127.

(*z*) *Hodle* v. *Healey*, 1 V. & B. 536.

(*a*) *Langrish* v. *Watts*, (1903) 1 K. B. 636, C. A.

(*b*) 9 Geo. IV. c. 14, s. 1.

(*c*) *Hyde* v. *Johnson*, 2 Bing. N. C. 776; *Clark* v. *Alexander*, 8 Sc. N. R. 165.

(*d*) *Richardson* v. *Younge*, L. R. 6 Ch. 478.

CHAPTER XL.

OUT OF WHAT FUND A MORTGAGE DEBT IS PAYABLE.

SECTION I.

PRIMARY LIABILITY OF PERSONALTY UNDER FORMER LAW.

Alteration of the law by Locke King's Act, &c.

i.—General Rule as to Mortgages of Realty before Locke King's Act.—The law relating to the primary liability of the personal estate of a deceased mortgagor to payment of a mortgage debt in exoneration of real estate comprised in the mortgage has been altered by the statute commonly known as Locke King's Act (*a*), which statute, however, does not apply to the estates of persons who died before the 1st of January, 1855, nor so as to affect the rights of any person claiming under or by virtue of any will, deed, or document made before that date. Moreover, neither that Act nor either of the amending Acts (*b*) have any application to mortgages of personalty other than leaseholds.

Former rule making personalty the primary fund.

The rule of law which prevailed before Locke King's Act was that, as between the heir or devisee of a deceased mortgagor on the one hand, and his personal representatives on the other, the personal estate was primarily liable to the payment of a debt secured by mortgage of real estate, so as to exonerate the mortgaged lands. This rule was of general application, and prevailed, subject to exceptions to be hereafter noticed, whether the lands in mortgage devolved on the heir-at-law (*c*), or on a general devisee (*d*), or a particular devisee (*e*); in either case the personal estate, in the absence of evidence of intention to the contrary, became the primary fund, and exonerated the real

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(*a*) 17 & 18 Vict. c. 113, *post*, p. 792.

(*b*) 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34. See *inf.* p. 794.

(*c*) *Cope* v. *Cope*, 2 Salk. 449; *Howel* v. *Price*, 1 P. Wms. 292; *Chester* v. *Powell*, 7 Jur. 389.

(*d*) *Galton* v. *Hancock*, 2 Atk. 436.

(*e*) *Johnson* v. *Milksopp*, 2 Vern. 112. And see *Galton* v. *Hancock*, *sup.*; *Re Smith*, *inf.*

estate from the debt; subject, however, to this, that devisees were not entitled to have the mortgages paid off out of the residuary personal estate until the pecuniary legacies had been satisfied (*f*). The rule held good even in the case of a Welsh mortgage, where the mortgagee cannot foreclose, nor bring an action for the sum lent (*g*); and whether, in the case of an ordinary mortgage, there was a covenant or bond accompanying the mortgage or not (*h*); and applied equally to the case of a devise by a mortgagee who had created a sub-mortgage (*i*).

Contrary intention might be express or implied.

ii.—Exemption of Personalty by Expressions of Contrary Intention.—The operation of the rule above referred to might, however, always have been excluded by contrary intention to be gathered expressly (*k*) or by plain implication (*l*) from the language of the mortgagor's will that the mortgage debt should be borne by the mortgaged property, or that the debts generally should be paid out of a specific fund in exoneration of the general personal assets; for in construing a direction for payment of debts the expression "debts" was, until the passing of the statute 40 & 41 Vict. c. 34, deemed to include mortgage debts (*m*).

Intention to exempt personal estate necessary.

But it was not sufficient for a testator to show an intention to charge his real estate with the payment of his debts; it was necessary also to show an intention to exempt his personal estate (*n*); though the grounds of this rule would appear to be somewhat weakened since the statute 3 & 4 Will. IV. c. 104, rendering realty assets for the payment of debts, though the Act gives no charge on the real estate until a judgment has been obtained (*o*).

Parol evidence not admissible.

The question was decided only by an examination of the

(*f*) *Re Smith, Smith* v. *Smith*, (1899) 1 Ch. 365; following *Lutkins* v. *Leigh*, Ca. t. Talb. 53.

(*g*) *Howel* v. *Price*, 1 P. Wms. 292.

(*h*) *Yates* v. *Aston*, 4 Q. B. 182; *Allenby* v. *Dalton*, 5 L. J. K. B. 312; *King* v. *King*, 3 P. Wms. 358; *Cope* v. *Cope*, 2 Salk. 449.

(*i*) See *Lockhart* v. *Hardy*, 9 Beav. 379.

(*k*) *Morrow* v. *Bush*, 1 Cox, 185; *Young* v. *Young*, 26 Beav. 522.

(*l*) *Ion* v. *Ashton*, 28 Beav. 379; *Forrest* v. *Prescott*, L. R. 10 Eq. 545.

(*m*) See *post*, p. 795.

(*n*) *Watson* v. *Brickwood*, 9 Ves. 447, 453; *Tower* v. *Lord Rous*, 18 Ves. 132; *Bootle* v. *Blundell*, 1 Mer. 193; *Rhodes* v. *Rudge*, 1 Sim. 79; *Walker* v. *Hardwick*, 1 My. & K. 396; *Collis* v. *Robins*, 1 De G. & S. 131; *Quenell* v. *Turner*, 13 Beav. 240; *Davies* v. *Ashford*, 15 Sim. 42; *Re Banks*, (1905) 1 Ch. 547.

(*o*) *Re Moon*, (1907) 2 Ch. 304.

whole will taken together, and extrinsic evidence was not received to show the testator's intention (*p*); though the Court has in some cases looked not only at the will, but also at settlements to which the devised estates were subject (*q*).

Express exoneration of personalty.

Where the personalty was expressly discharged from the payment of a particular debt, or of debts generally, the exemption is clear; the effect was to throw the liability on all other property not expressly exempted (*r*).

Exoneration by express charge of mortgage debts.

Where a mortgaged estate was devised expressly charged with "the payment of any sum or sums of money on the security of the said estate," it was held that the personalty was exonerated (*s*).

Express trust to pay debts.

So, also, the personalty was held to be exempted where there was an express trust to pay mortgage debts and interest out of the rents and the produce of the sale of the particular estate mortgaged (*t*).

Where a testator bequeathed legacies and annuities, and charged them on real estate which he devised subject thereto, the personalty was exonerated (*u*); but a devise of the mortgaged estate, "subject to the mortgages affecting the same," did not exempt the personalty: it was held to be mere description (*x*).

Other cases of exoneration.

The personalty was also exonerated where it was bequeathed in trust as the testator should appoint, and in default to the trustee and executors (*y*); where there was a particular direction that funeral expenses should be paid out of the real estate (*z*); where the residuary legatee had the first life interest in the real estate (*y*); where the trustees and executors were the same persons, but the two characters were carefully kept separate (*a*); where the gift of the general personal estate was specific (*b*).

(*p*) *Bootle* v. *Blundell*, 1 Mer. 193, 216.

(*q*) *Ibbetson* v. *Ibbetson*, 12 Sim. 206; *Langdale* v. *Briggs*, 8 D. M. & G. 391.

(*r*) *Young* v. *Young*, 26 Beav. 522; *Gilbertson* v. *Gilbertson*, 34 Beav. 357.

(*s*) *Evans* v. *Cockeram*, 1 Coll. 428. And see *Dawes* v. *Scott*, 5 Russ. 42; *Clutterbuck* v. *Clutterbuck*, 1 My. & K. 15; *Hatch* v. *Skelton*, 20 Beav. 453; *Lady Langdale* v. *Briggs*, 8 De G. M. & G. 391; *Birds* v. *Askey*, 24 Beav. 618, 620.

(*t*) *Symons* v. *James*, 2 Y. & C. C. C. 301.

(*u*) *Ion* v. *Ashton*, 28 Beav. 379; *Sinnett* v. *Herbert*, L. R. 12 Eq. 206; reversed on other points, L. R. 7 Ch. 232.

(*x*) *Townshend* v. *Mostyn*, 26 Beav. 72.

(*y*) *Burton* v. *Knowlton*, 3 Ves. 107. But see *Aldridge* v. *Lord Wallscourt*, 1 Ba. & Be. 312.

(*z*) *Bootle* v. *Blundell*, 1 Mer. 193; *Gilbertson* v. *Gilbertson*, 34 Beav. 357; *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591.

(*a*) *Bootle* v. *Blundell*, *sup.*

(*b*) *Blount* v. *Hipkins*, 7 Sim.

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§ 1 (ii.)

But a specific gift of all the personal estate to A., followed by a devise of real estate to B., subject to the payment of debts, does not exonerate the personalty, especially where a wish is expressed that the realty shall not be sold while any descendants of the testator's name are living (*c*).

Direction to pay debt out of particular part of realty.

An express direction that a particular debt should be paid out of a particular portion of the real estate exonerated the personalty (*d*).

Cases where the personalty was held not to be exonerated.

Where all the personalty was bequeathed to the executor, who was also one of the devisees of the real estate (*e*); where the legatee of the personalty was tenant for life of the real estate, and also executor (*f*); where the legatee of the personalty was appointed executor together with the trustees of the real estate (*g*)—there was no exemption; and no trace of intention to exonerate was held to exist where the personalty is undisposed of (*h*).

Direct bequest to executors.

The personal estate was not exempted from debts by a direct bequest to the executors (*i*).

Same persons trustees and executors.

The circumstance of the same persons being appointed trustees and executors has had considerable weight in inducing judges to draw an inference that the personal estate is not to be exempted (*k*); and Lord Alvanley has remarked (*l*) that the circumstance of the trustees not being the executors is always favourable to the exemption of the personal estate.

Bequest of residue.

A bequest of a residue has always been considered unfavourable to exemption (*m*). But a distinction has been drawn in cases in which the residue has been immediately preceded by an enumeration of specific articles, not likely to be intended by the testator to be sold (*n*); and also in cases in which the residue has

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43. And see *Driver* v. *Ferrand*, 1 R. & My. 681. But see *Collis* v. *Robins*, 1 De G. & S. 131; *Lance* v. *Aglionby*, 27 Beav. 65.

(*c*) *Re Banks*, (1905) 1 Ch. 547.

(*d*) *Hancox* v. *Abbey*, 11 Ves. 179.

(*e*) *Brummel* v. *Prothero*, 3 Ves. 111; *Watson* v. *Brickwood*, 9 Ves. 447.

(*f*) *Watson* v. *Brickwood*, *sup.* And see *Tower* v. *Lord Rous*, 18 Ves. 132.

(*g*) *Hartley* v. *Hurle*, 5 Ves. 540.

(*h*) *Lomax* v. *Lomax*, 12 Beav. 285.

(*i*) *Ancaster* v. *Mayer*, 1 Bro. C. C. 462; *Bootle* v. *Blundell*, 1 Mer. 223.

(*k*) *Dolman* v. *Smith*, Prec. Ch. 456. And see *Bootle* v. *Blundell*, *sup.*; *Rhodes* v. *Rudge*, 1 Sim. 79. But see *Driver* v. *Ferrand*, 1 R. & My. 681, where the contrary inference was drawn under the circumstances of the case.

(*l*) In *Burton* v. *Knowlton*, 3 Ves. 108.

(*m*) *Lord Inchiquin* v. *French*, Amb. 33; *Phillips* v. *Phillips*, 2 Bro. C. C. 273; *Stephenson* v. *Heathcote*, cited 1 Bro. C. C. 458.

(*n*) *Adams* v. *Meyrick*, 1 Eq. Ca. Abr. 271; *Bradnox* v. *Gratwick*, cited 3 P. Wms. 325; *Blount* v. *Hipkins*, 7 Sim. 43; *Greene* v.

been considered as not meaning the residue after satisfaction of debts, &c., but the residue of the personal estate before specifically bequeathed (*o*); and in all cases in which, from circumstances, it can be considered as specific, it will be exempted.

Devise subject to debts.

It was well settled that a devise of lands "subject to" debts generally, or to a specific mortgage or charge on the land, was to be considered to be merely descriptive of the state of the property, and not an indication of intention to throw the burden of the debts or charge on the lands in exoneration of the assets (*p*).

So, where a testator having two estates comprised in one mortgage devised one estate to A., subject to the payment of part of the debt, and the other estate to B., subject to the payment of the residue, it was held that this only fixed the proportions in which the estates were to bear the charge, and did not imply an intention to exonerate the personal estate (*q*).

In one case (*r*) a devise of an estate to a person, "he paying the mortgage thereon," was held to impose the burden on the estate in exoneration of the personalty, but the contrary was decided as to similar words in two earlier cases (*s*).

Real and personal estate in same settlement.

The circumstance of the possession of the real and personal estate accruing to one and the same person, *i.e.*, of the real estate charged with debts being limited in strict settlement, and the personal estate being given to the person who was entitled to the possession of the real estate, so that the personal estate was made to accrue to the real estate, was differently considered by different judges. The balance of authority was in favour of the view that testator must have meant that his personal estate should not be exempt (*t*).

When funeral expenses are not charged.

It seems that the omission to charge funeral expenses (*u*) on

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Greene, 4 Madd. 148; *Michell* v. *Michell*, 5 Madd. 69.

(*o*) *Att.-Gen.* v. *Barkham*, cited Forrester, Cas. t. Talb. 206; *Waise* v. *Whitfield*, 2 Eq. Ca. Abr. 374; *Walker* v. *Jackson*, 2 Atk. 624; *Stapleton* v. *Colvile*, Forrester, Cas. t. Talb. 202; *Clutterbuck* v. *Clutterbuck*, 1 My. & K. 15.

(*p*) *Serle* v. *St. Eloy*, 2 P. Wms. 386; *Ancaster* v. *Mayer*, 1 Bro. C. C. 454; *Astley* v. *Tankerville*, 3 Bro. C. C. 545; *Barnewell* v. *Lord Cawdor*, 3 Madd. 453; *Bickham* v. *Crutwell*, 3 My. & Cr. 763; *Townshend* v. *Mostyn*, 26 Beav. 72.

(*q*) *Goodwin* v. *Lee*, 1 K. & J. 377.

(*r*) Per Lord Langdale in *Lockhart* v. *Hardy*, 9 Beav. 379.

(*s*) *Bridgeman* v. *Dove*, 3 Atk. 201; *Mead* v. *Hide*, 2 Vern. 120. Neither of these cases was cited in *Lockhart* v. *Hardy*, *sup.*

(*t*) *Dolman* v. *Smith*, Prec. Ch. 456; *Haslewood* v. *Pope*, 3 P. Wms. 323; *Harewood* v. *Child*, cited Forrester, Cas. t. Talb. 204.

(*u*) See, as to the effect of such a charge under the present law, *post*, p. 798.

the real estate was regarded as a circumstance of some weight to show that the personal estate was not to be exempt, because funeral expenses are the first charge on that fund (*x*), and also because it showed that the testator intended the personal estate to be charged beyond the particular legacies or charges mentioned in the will, and being once broken in upon, the argument of its being specific was destroyed (*y*).

Suspension of liability of personalty.

The primary liability of the personal estate might have been suspended for a time; as where a mortgagor directed by his will that the interest of a mortgage debt should form part of annuities, which he devised, out of the mortgaged estate, to the person having a life interest in the mortgage debt (*z*).

Ground of the general rule.

iii.—Exceptions to the Rule.—To the general rule, as to the primary liability of personalty under the former law, there were certain important exceptions. In order to apply the rule that personalty was the primary fund applicable for payment of a mortgage debt, the incumbrance must have been created or adopted by the deceased owner himself.

Exception only applies where debt is of ancestor or testator himself.

If, then, the mortgage debt was not the debt of the testator or ancestor himself, but the estate had come to him by devise or descent, incumbered with a mortgage created by a prior owner, there was no ground for the application of the general rule; but the mortgaged estate in the hands of such testator or ancestor was, unless he had done some act to make the debt his own, primarily liable to discharge the debt in exoneration of the personalty (*a*).

Adoption of debt by heir or devisee.

Where, however, the mortgage debt was not originally the debt of the deceased owner of the mortgaged property, yet he might, in his lifetime, adopt the mortgage debt and make it his own by some act affording sufficient evidence of intention so to do, in which case his personal estate, as between his real and personal representatives, became primarily liable to discharge the debt (*b*).

Evidence of intention to adopt debt.

In matters of this sort, the question is confined to evidence of intention; and therefore as, on transfer or assignment of the mortgage, the concurrence of the heir or devisee, or of the hus-

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(*x*) *Burton* v. *Knowlton*, 3 Ves. 107.

(*y*) See *Brydges* v. *Phillips*, 6 Ves. 567.

(*z*) *Sargent* v. *Roberts*, 17 L. J. Ch. 117.

(*a*) *Scott* v. *Beecher*, 5 Madd. 96. See also *Swainson* v. *Swainson*, 6 De G. M. & G. 648; *Bond* v. *England*, 2 K. & J. 44.

(*b*) See *Barham* v. *Earl of Thanet*, 3 My. & K. 607, and other cases cited, *inf*.

band of such party, in the deed, and his personal covenant for payment of the money, is only by way of additional security to the mortgagee, the burden of the debt was not, as between the real and personal representatives, altered (*c*). And even where a party entitled to the estate under the limitations of a settlement became also entitled to a charge on the estate, which charge he assigned as a security for a sum borrowed by him, the land remained the fund for payment (*d*). The same principle applied if other estates were added to the security, on a further sum being lent (*e*), or if there were a covenant on his part for increasing the rate of interest (*f*); and it seems that if the sums borrowed by the heir or devisee, and added to the original mortgage, were comparatively small, the Court would not have considered that he had different intentions as to the different sums, but would have charged the real estate with the whole (*g*). The latter doctrine must, however, be received with much caution.

Where, since the execution of a mortgage of lands, the equity of redemption had become vested in several persons, and on a transfer of the mortgage the deed of transfer contained a covenant by the mortgagors for personal payment of their respective proportions of the mortgage debt, and also a new proviso for redemption, providing for re-conveyance to each person of his own share, it was held that the personal estates of such persons were not rendered primarily liable for the payment of the mortgage debt notwithstanding the covenant and proviso, since these only expressed what the law would imply (*h*).

The same rule applied to the heir or devisee as to a purchaser (*i*), that a charge by his will of debts generally on his real and personal estate would not of itself have been sufficient to shift the onus from the mortgaged estate (*k*).

Even a direct and original mortgage made by the heir or devisee would not have operated to render his personal estate

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(*c*) *Bagot* v. *Oughton*, 1 P. Wms. 347; *Evelyn* v. *Evelyn*, 2 P. Wms. 658; *Leman* v. *Newnham*, 1 Ves. Sen. 51. And see *Waring* v. *Ward*, 7 Ves. 336.

(*d*) *Noel* v. *Lord Henley*, M'Cl. & Y. 302.

(*e*) *Duke of Ancaster* v. *Mayer*, 1 Bro. C. C. 454, 464.

(*f*) *Shafto* v. *Shafto*, 2 P. Wms. cited 664, n.

(*g*) *Lewis* v. *Nangle*, 2 P. Wms. cited 664, n.

(*h*) *Hedges* v. *Hedges*, 5 De G. & S. 389.

(*i*) *Duke of Ancaster* v. *Mayer*, 1 Bro. C. C. 454; *Butler* v. *Butler*, 5 Ves. 534.

(*k*) *Lawson* v. *Hudson*, 1 Bro. C. C. 58; *Hamilton* v. *Worley*, 2 Ves. Jun. 62; *Leman* v. *Newnham*, 1 Ves. Sen. 51; *Butler* v. *Butler*, 5 Ves. 534; *Duke of Ancaster* v. *Mayer*, *sup.*

the primary fund, if the money borrowed was for the purpose of paying off the debts (*l*) or legacies (*m*) of the ancestor or devisor.

Further advance.

In the case of *Barham* v. *Earl of Thanet* (*n*), where the heir of the mortgagor and the mortgagee joined in conveying a part of the property to a fresh mortgagee, who advanced a sum to pay off a part of the first mortgage, with an entirely new equity of redemption, and alteration of the rate of interest, it was held that this amounted to an original mortgage, and was not an assignment, and the personal assets of the heir were therefore first applied to payment of the debt.

Consolidation.

Where the heir consolidated his own mortgage and the mortgage of his ancestor into one mortgage and covenanted to pay the whole, he made it his own debt (*o*).

Devisee appropriating fund set apart for debts.

In a case, in which part of a testator's real estate was by Act of Parliament expressly set aside for the payment of his debts, and the devisee converted the money to his own use, it was held that he had made the debt his own, and that his personal estate was primarily liable for the payment of the debts (*p*).

Purchase of equity of redemption.

The same principles which determined what property was primarily liable to a mortgage debt in cases of descent or devise, applied also to the case of a purchaser of property subject to a mortgage. So, if a man purchased an estate subject to an existing mortgage, the debt did not, without more, become his debt, so as to render him personally liable to the mortgagee; the land remained the proper fund for its discharge; and it required clear evidence of intention on the part of the purchaser to make the debt his own, so as to render his personal estate the primary fund for payment (*q*).

Evidence of intention to adopt debt.

In such a case the question may arise what degree of evidence was sufficient to indicate the purchaser's intention to make the debt his own? Generally speaking, a covenant with the vendor for payment of the debt would not have that effect, it being no

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(*l*) *Tankerville* v. *Fawcett*, 1 Cox, 237; *Perkyns* v. *Baynton*, 2 P. Wms. cited 664, n.

(*m*) *Basset* v. *Perceval*, 1 Cox, 268; *Mattheson* v. *Hardwicke*, 2 P. Wms. 665, n.; *Billinghurst* v. *Walker*, 2 Bro. C. C. 604; *Hamilton* v. *Worley*, 2 Ves. Jun. 62.

(*n*) 3 My. & K. 607.

(*o*) *Townshend* v. *Mostyn*, 26 Beav. 72. And see *Bagot* v. *Bagot*, 34 Beav. 134.

(*p*) *Effingham* v. *Napier*, 5 Bro. P. C. 22.

(*q*) See per Arden, M.R., in *Woods* v. *Huntingford*, 3 Ves. 128. See also *Barry* v. *Harding*, 1 J. & L. 475; *Mills* v. *United Counties Bank*, *inf.*

more than a covenant of indemnity (*r*), even though it provided for a higher rate of interest (*s*). In one case, however, a covenant of that nature was held sufficient for the purpose (*t*), the purchaser having joined in the covenant to the mortgagee, and afterwards borrowed a further sum, and made a fresh mortgage for the whole debt.

Fresh contract between purchaser and mortgagee.

Where there was a fresh agreement altogether for payment of the original debt, between the purchaser and the mortgagee *de novo* (*u*), it was decided that the personal estate of the purchaser was the primary fund. In another case (*x*), where an estate subject to a mortgage was sold out of Chancery, and the purchaser borrowed a larger sum, out of which the mortgage debt was paid off and a new mortgage created, the whole debt was directed to be paid out of the personal estate of the purchaser, on the ground that the transaction was a personal contract between the purchaser and the mortgagee.

Purchaser must indemnify vendor.

But whether he contracts to do so or not, the purchaser of an estate in possession subject to a mortgage is bound to indemnify the vendor against his personal covenant to pay the mortgage debt. This rule, however, does not apply where the subject-matter of the sale is a contingent reversionary interest or where there is an express limited indemnity or the implication is otherwise rebutted (*y*).

Mere charge not imposing personal liability.

Another class of cases to which the general rule as to the exoneration of the mortgaged estate at the expense of the personalty did not apply, was where the transaction did not strictly impose any personal liability on the owner of the mortgaged property or on any other person; as where a sum of money was agreed to be settled and secured on land, though the mortgage deed contained a covenant for payment; in such cases the personalty was not benefited by the mortgage, and accordingly the mortgaged property must have borne the burden (*z*).

Settlement subject to mortgages.

Where an estate has been settled by deed, subject to mortgages created by the settlor, or to be created under a power

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(*r*) *Forrester* v *Leigh*, Amb. 171; *Waring* v. *Ward*, 7 Ves. 332, at p. 337; *Bridgman* v. *Daw*, 40 W. R. 253.

(*s*) *Shafto* v. *Shafto*, 1 Cox, 207; *Waring* v. *Ward*, *sup*. But see *Bruce* v. *Morice*, 2 De G. & S. 389.

(*t*) *Woods* v. *Huntingford*, *sup*. See *Butler* v. *Butler*, 5 Ves. 534.

(*u*) *Earl of Oxford* v. *Lady Rodney*, 14 Ves. 417.

(*x*) *Waring* v. *Ward*, 7 Ves. 332.

(*y*) *Mills* v. *United Counties Bank*, (1911) 1 Ch. 669, but see *S. C.* in C. A., (1912) 1 Ch. 231.

(*z*) *Graves* v. *Hicks*, 6 Sim. 398. See *Lanoy* v. *Duke of Athol*, 2 Atk. 444; *Lechmere* v. *Charlton*, 15 Ves. 193, *post*, p. 790.

given him by the settlement, the devisees of the reversion in fee would, it seems, not have had the usual right of exoneration out of the personal estate, on account of the difficulty of attributing a divided intention to the settlor as to different parts of the fee, unless such intention were shown, for which a general charge of debts on real and personal estate was not sufficient (*a*).

The rule of exoneration did not apply to a mortgage made under a power, as in that case the property, as between the persons entitled to it and the mortgagor, was looked upon as the debtor, even though the personalty of the donee of the power might have received the benefit of the charge (*b*).

Settlor paying off charge.

If a person who had secured by mortgage the payment of a sum agreed to be settled by him, paid off the charge, he became himself an incumbrancer to that extent for the benefit of his personal estate (*c*).

Failure of intermediate limitations.

Where a tenant for life created a charge in exercise of a power, and afterwards, by failure of the intermediate limitations, became entitled to the fee, it seems clear that his personal estate would not have been primarily liable if he had died tenant for life (*d*); but if the ultimate remainder had become vested in possession during his lifetime, the point does not seem free from doubt (*e*).

Case of surety.

It remains to consider how far the above principles were applicable in the case of a surety.

In many instances, persons are concurring parties in a mortgage, or assignment of mortgage, in the character of sureties. For instance, if a man having a power to charge an estate with a sum of money, raised it by way of mortgage, and on an assignment of the mortgage the person then entitled to the estate is a party, and gives his personal covenant for payment (*f*), the covenant will operate as an auxiliary security only, and the land must bear the onus: or, if a person having

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(*a*) *Ibbetson* v. *Ibbetson*, 12 Sim. 206; *Lady Langdale* v. *Briggs*, 8 De G. M. & G. 391; *Bruce* v. *Morice*, 2 De G. & S. 389; *Loosemore* v. *Knapman*, Kay, 123.

(*b*) *Jenkinson* v. *Harcourt*, Kay, 688; *Scholefield* v. *Lockwood*, 4 De G. J. & S. 28. See *Barham* v. *Earl of Clarendon*, 10 Ha. 126; *Re Anthony*, (1893) 3 Ch. 498.

(*c*) *Vandeleur* v. *Vandeleur*, 3 Cl. & F. 82; *Reddington* v. *Reddington*, 1 Ba. & Be. 131; *Exp. Digby*, Jac. 235; *Jameson* v. *Stein*, 21 Beav. 5.

(*d*) *Noel* v. *Noel*, 12 Pri. 213, at pp. 307, 308; *Langdale* v. *Briggs*, 8 De G. M. & G. 391.

(*e*) See *Scott* v. *Beecher*, 5 Madd. 96; *Ilchester* v. *Carnarvon*, 1 Beav. 209; *Clarendon* v. *Barham*, 1 Y. & C. C. C. 688, 711.

(*f*) *Evelyn* v. *Evelyn*, 2 P. Wms. 664. And see *Lechmere* v. *Charlton*, 15 Ves. 193.

an estate in lands concur in a mortgage with some other party having also an estate in the same lands, for the purpose of raising a sum of money for the benefit of the latter, he is merely a surety, and may require to have his estate exonerated out of the assets of the other party; and it is said, if he enter into no covenant, that he will not be personally liable to the mortgagee either by way of specialty or simple contract (*g*).

But if he entered into a covenant with the mortgagee, and the estate of the other party was insufficient to meet the debt, it was a question whether his estate in the land or his personalty was the primary fund.

The mortgage debt has been held to be adopted by a surety, so as to discharge the mortgaged estate, where he devised it to the principal debtor and directed that all moneys payable out of it under the mortgage should be discharged out of a fund which he provided for the payment of his debts (*h*).

On the principle of suretyship rest the cases in which it has been decided that if in a settlement of real estate a settlor covenant for payment of children's portions or widow's jointure (*i*), or if a person make a voluntary gift by way of charge, and covenant for payment of the money (*k*), the land must be the primary fund for payment.

So, if tenant for life, with power of charging real estate, made a charge with a covenant for payment, his personal estate was not primarily liable to exonerate the land (*l*).

Husband and wife.

If a husband and wife concur in mortgaging the estate of the latter for the benefit of the former, a question arises as to the right of the wife to have the mortgaged property indemnified by the husband, who is the principal debtor. This question has been already considered in a previous Chapter (*m*).

Mortgage of personalty.

iv.—Exoneration of Personalty specifically mortgaged out of the General Assets.—As regards mortgages and pledges of personalty (including leaseholds, prior to the passing of the

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(*g*) *Lloyd* v. *Thursby*, 2 Cru. Dig. (4th ed.) p. 124.

(*h*) *Musket* v. *Cliffe*, 2 De G. & S. 243.

(*i*) *Lanoy* v. *Duke of Athol*, 2 Atk. 444; *Edwards* v. *Freeman*, 2 P. Wms. 438; *Coventry* v. *Coventry*, 2 P. Wms. 222; *Graves* v. *Hicks*, 6 Sim. 398. And see *Lucy* v. *Gardener*, Bunb. 137.

(*k*) *Wilson* v. *Darlington*, 2 P. Wms. 664, n.

(*l*) *Exp. Earl Digby*, Jac. 235, 238; *Scholefield* v. *Lockwood*, 4 De G. J. & S. 28.

(*m*) See Chap. XX., *ante*.

statute 40 & 41 Vict. c. 34 (*n*)), the general rule of law was that the general assets of a deceased mortgagor or pledgor were primarily liable to satisfy the debt in exoneration of the particular property comprised in the mortgage or pledge, which was regarded merely as a collateral security for the debt (*o*). And in one case it was held that a specific legatee of stock, for the sale of part of which a power of attorney was, after the date of the will, executed by the testator to parties, who honoured his bills, but did not sell the stock till after his death, was in the position of a legatee of mortgaged property, and, therefore, entitled to throw the debt upon the general estate. So in *Blount* v. *Hipkins* (*p*), a legatee of railway shares, to which the testator was an original subscriber, was held to have a right to be indemnified against future calls out of the testator's personal estate (*q*).

Bequest of fund after payment of debts.

In a bequest of money, after payment of debts, to A., and of all other property to B., the money was held to be the primary fund (*r*).

As Locke King's Act and the amending Acts apply only to real estate and chattels real, if a testator mortgages or pledges chattels personal, they must still be redeemed for a specific legatee at the expense of the general assets (*s*).

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SECTION II.

ALTERATION OF THE LAW BY LOCKE KING'S ACT AND THE AMENDING ACTS.

Locke King's Act.

i. **Mortgage Debt primarily payable out of mortgaged Lands.**—By sect. 1 of the statute commonly known as Locke King's Act (*t*), it is enacted as follows:—

Heir or devisee not to claim pay-

"When any person shall, after the 31st day of December, 1854, die seised of or entitled to any estate or interest in any land or other

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(*n*) See *post*, p. 795.

(*o*) *Knight* v. *Davis*, 3 My. & K. 358.

(*p*) 7 Sim. 43. And see next note.

(*q*) 7 Sim. 43, 51; *Day* v. *Day*, 1 Dr. & S. 261; *Re Box's Trust*, 3 N. R. 65; *Clive* v. *Clive*, Kay, 600; *Barry* v. *Harding*, 1 J. & L. 490; *Moffett* v. *Bates*, 3 Sm. & G. 468. But see *Armstrong* v. *Burnet*, 20 Beav. 424.

(*r*) *Vernon* v. *Earl Manners*, 31 Beav. 623.

(*s*) *Lewis* v. *Lewis*, L. R. 13 Eq. 226; *Bothamley* v. *Sherson*, L. R. 20 Eq. 314.

(*t*) 17 & 18 Vict. c. 113, now called the Real Estate Charges Act, 1854.

ment of mortgage out of personal assets.

hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the lands or hereditaments so charged shall as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof. Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise. Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the 1st day of January, 1855."

Act not to affect rights under wills, &c. made before 1st Jan., 1855.

Extent of Act.

It will be observed that this Act applies only to mortgages of land or other hereditaments; it applies to copyholds (*u*); but was held not to apply to leaseholds (*x*); but leaseholds have been included within its operation by the statute hereafter referred to (*y*). Mortgages of personalty other than leaseholds are still subject to the former law, so that the legatee of the particular mortgaged property is entitled to have it exonerated out of the general assets (*z*).

Debentures.

The Act does not apply to a charge on land abroad nor to debentures (*a*).

Mortgage by deposit of deeds.

The word "mortgage" only is used in the Act, and this expression has been held to include an equitable mortgage by deposit of deeds with or without a memorandum (*b*), and though the deposit be expressly "by way of collateral security for money lent on a promissory note" (*c*).

Act applies only to specific charges.

But the expression included only specific charges (*d*), and accordingly the Act was held not to apply to a general charge

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(*u*) *Piper* v. *Piper*, 1 J. & H. 91.

(*x*) *Solomon* v. *Solomon*, 33 L. J. Ch. 473; *Wormsley's Estate*, 4 Ch. D. 665.

(*y*) 40 & 41 Vict. c. 34, s. 1, set out *inf.* See *Re Kershaw, Drake* v. *Kershaw*, 37 Ch. D. 674.

(*z*) See *ante*, pp. 781 *et seq.*

(*a*) *Re Chantrell*, W. N. (1907) 213.

(*b*) *Pembrooke* v. *Friend*, 1 J. & H. 132; *Coleby* v. *Coleby*, L. R. 2 Eq. 803.

(*c*) *Ibid.* And see *Davis* v. *Davis*, W. N. (1876) 242.

(*d*) *Re Dunlop, Dunlop* v. *Dunlop*, 21 Ch. D. 583, 590, C. A.

by will on real estate (*e*); and this decision does not appear to be affected by the amending Acts.

Option to purchase.

The donee under a will of an option to purchase certain land, which is subject to a mortgage, at a fixed price, is not a "devisee" within the meaning of the Act, and he is therefore entitled to have the property conveyed to him free from the mortgage (*f*).

Trusts for conversion.

So, also, a mortgage of a share of the proceeds of sale of land directed to be converted by a prior settlement, is not within the Act (*g*).

Questions arising under the Act.

Numerous questions also arose, some of which occasioned conflict of judicial opinion, as to what was a sufficient indication of "contrary intention" so as to exclude the operation of the Act, and, in particular, as to whether a general direction for payment of debts out of the personal estate was sufficient for that purpose (*h*).

Moreover, contrary intention so as to exclude the operation of this Act was held to be sufficiently indicated by a gift of residue of real and personal estate (*i*), or of personal estate (*k*) upon trust for, or charged with the payment of the testator's debts, without express mention of mortgage debts.

In order to solve these difficulties, the Real Estate Charges Acts, 1867 and 1877 were successively passed by the legislature, by the first (*l*) of which it is enacted as follows:—

In construing wills, general direction for payment of debts out of personalty not to include mortgage debts, unless

Sect. 1. "In the construction of a will of any person who may die after the 31st day of December, 1867, a general direction that the debts, or that all the debts, of the testator (*m*) shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act (*n*), unless such contrary or other intention shall be further declared by words expressly or by necessary implication

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(*e*) *Hepworth* v. *Hill*, 30 Beav. 476.

(*f*) *Re Wilson, Wilson* v. *Wilson*, (1908) 1 Ch. 839, following *Given* v. *Massey*, 31 L. R. Ir. 126.

(*g*) *Lewis* v. *Lewis*, L. R. 13 Eq. 218. See *Re Bennett*, (1899) 1 Ch. 316.

(*h*) *E.g.*, cf. *Eno* v. *Tatham*, 3 De G. J. & S. 443; 1 N. R. 529; and *Woolstencroft* v. *Woolstencroft*, 2 De G. F. & J. 347.

(*i*) *Stone* v. *Parker*, 1 Dr. & Sm. 212; *Allen* v. *Allen*, 30 Beav. 395; *Newman* v. *Wilson*, 31 Beav. 33; *Re Nevill, Robinson* v. *Nevill*, W. N. (1890) 125; 62 L. T. 864.

(*k*) *Smith* v. *Smith*, 3 Giff. 263; *Mellish* v. *Vallins*, 2 J. & H. 194; *Eno* v. *Tatham*, 3 De G. J. & S. 451; *Moore* v. *Moore*, 1 De G. J. & S. 602, overruling *Rowson* v. *Harrison*, 31 Beav. 207.

(*l*) 30 & 31 Vict. c. 69.

(*m*) "Intestates" are omitted from this Act; but the omission was remedied in the next mentioned Act. See *Harding* v. *Harding*, L. R. 13 Eq. 493.

(*n*) 17 & 18 Vict. c. 113, *sup.*

referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."

intention expressly implied.

Sect. 2. "In the construction of the said Act and of this Act the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator" (*o*).

Interpretation of word "mortgage."

The second of the amending Acts (*p*) above referred to, enacts as follows:—

Application of Acts in schedule to lands of any tenure.

Sect. 1. "The Acts (*q*) mentioned in the schedule hereto shall, as to any testator or intestate dying after the 31st day of December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage or any other equitable charge, including any lien for unpaid purchase-money; and the devisee or legatee or heir (*r*) shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall, within the meaning of the said Acts, have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or a direction for payment of debts upon or out of residuary real and personal estate or residuary real estate."

General effect of the Acts.

Considering these Acts which are to be read together (*s*) as a whole, it will be seen that their effect, in cases to which they apply, is to altogether reverse the former law as to the exoneration of mortgaged estates, and to throw upon the devisee of a deceased mortgagor who seeks to have mortgaged lands of any tenure exonerated out of the assets, the burden of showing that the mortgagor has by his will sufficiently indicated an intention to exclude the operation of the Acts. A mortgaged estate devolving upon the heir of an intestate mortgagor can in no case be exonerated under these Acts.

Personal liability not imposed on heir or devisee.

The Acts do not impose any personal liability in respect of the mortgage debt upon the heir or devisee of the mortgaged estate, but merely prevent him, in the absence of expressions of contrary intention, from being entitled to call upon the personal representatives of the intestate or testator to pay off the mortgage debt (*t*).

(*o*) As to vendor's lien, see *Re Cockroft, Broadbent* v. *Groves*, 24 Ch. D. 94; *Re Kidd, Brooman* v. *Withall*, (1894) 3 Ch. 558; *Re Fraser*, (1904) 1 Ch. 726.

(*p*) 40 & 41 Vict. c. 34.

(*q*) 17 & 18 Vict. c. 113; and 30 & 31 Vict. c. 69, *sup.*

(*r*) As to next of kin, see *Re Fraser*, (1904) 1 Ch. 726.

(*s*) *Re Fraser*, *sup.*

(*t*) *Syer* v. *Gladstone*, 30 Ch. D. 614, 616.

Mortgage comprising realty and personalty.

Where real and personal estate are comprised in the same mortgage, there is nothing in Locke King's Act or the amending Acts which throws the liability to pay the whole debt upon the realty in exoneration of the personalty; in such a case the mortgage debt must, as between the heir or devisee of the realty and the personal representatives of the mortgagor, be borne rateably according to the value of the respective properties at his death (*u*), unless, on the construction of the instrument of charge, it appears that one or other of the properties should be primarily charged (*x*). And a similar rule applies where two separate real estates are comprised in the same mortgage (*y*).

Aggregation of devises and charges.

Since the Acts, a collective devise of lands of any tenure to the same set of persons *primâ facie* throws the aggregate charges on to the aggregate lands in exoneration of the personal estate (*z*).

Persons claiming through deceased.

In Locke King's Act, the words "as between the different persons claiming through or under the deceased person," include the Crown claiming personalty on an intestacy in default of next of kin of deceased mortgagor. So, where a person made his will, in 1858, devising real estate which was subject to a mortgage, and disposing of his personalty upon trusts which failed, and died leaving a widow, but no next of kin, it was held that the executors took the personalty as trustees for the widow and the Crown in moieties, and that the devisee was not entitled to have any part of the personalty applied in discharge of the mortgage (*a*).

Rent-charge out of leaseholds.

A rent-charge issuing out of leaseholds, contracted to be purchased by a testator who died intestate in respect thereof, is within the Acts, and passes to the next of kin subject to the vendor's lien (*b*).

Mortgage to secure partnership debt.

The Act does not apply to the case of a charge created by one partner on his separate real estate to secure a debt of the partnership when at the time of his death the partnership assets are sufficient to answer the partnership debts. A dispute, therefore, between legatees and the devisee of the mortgaged land as to

(*u*) *Trestrail* v. *Mason*, 7 Ch. D. 655; *Re Newmarch, Newmarch* v. *Storr*, 9 Ch. D. 12, C. A.; *Leonino* v. *Leonino*, 10 Ch. D. 460; *Re Athill*, 16 Ch. D. 211.

(*x*) *Lipscomb* v. *Lipscomb*, L. R. 7 Ex. 502.

(*y*) *De Rochefort* v. *Dewes*, L. R. 12 Eq. 502.

(*z*) *Re Kensington, Longford* v. *K.*, (1902) 1 Ch. 203.

(*a*) *Deare* v. *Patrickson*, 1 Dr. & S. 182.

(*b*) *Re Fraser*, (1904) 1 Ch. 726, C. A. See *Re Fry*, (1912) 2 Ch. 86.

the incidence of liability is not a dispute between "persons claiming through or under the deceased person," and the devisee is not liable to discharge the mortgage (*c*).

Saving clause.

The clause at the end of sect. 1 of Locke King's Act saving the rights of persons claiming under or by virtue of any will, deed or document made before the 1st of January, 1855, seems, as regards wills so made, to make them speak from the date of execution and not from the death of the testator for the purpose of excluding the operation of the Act. The Act does not apply to any will made before the Act, though republished after the Act (*d*).

This latter proviso does not apply to the heir of a mortgagor who had executed the mortgage before January 1st, 1855 (*e*), nor to an heir claiming a lapsed devise, as he does not claim under the will (*f*).

"Equitable charges."

An "equitable charge" within the meaning of the Act of 1877 is where land is made security for a debt by any instrument which gives to the person entitled to the charge an equitable interest in the land (*g*). Thus an annuity is an equitable charge (*h*), and so is land delivered in execution under a writ of elegit to a judgment creditor (*i*). Indeed, the Act of 1877 applies to every equitable charge of whatever nature or description, whether created by statute or however enforceable. It applies therefore to estate duty (*k*).

In any cases which may arise under the former law, and also in any cases coming under Locke King's Act and the amending Acts, where either a will contains a sufficient indication of intention to exclude the operation of the Acts, or where the value of the mortgaged land is insufficient for the payment of the mortgage moneys in full, the mortgagee will be entitled to claim payment out of the general assets of the deceased mortgagor in a due course of administration.

For an examination of the law as to the order of administration of assets, and as to marshalling of assets, reference should

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(*c*) *Re Ritson, R.* v. *R.*, (1899) 1 Ch. 128. See *Re Hawkes*, (1912) 2 Ch. 251.

(*d*) *Rolfe* v. *Perry*, 3 De G. J. & S. 481.

(*e*) *Piper* v. *Piper*, 1 J. & H. 91. See *Power* v. *Power*, 8 Ir. Ch. 340.

(*f*) *Nelson* v. *Page*, L. R. 7 Eq. 25.

(*g*) *Re Sharland*, 74 L. T. 664, per Lindley, L.J.

(*h*) *Ibid.*

(*i*) *Re Anthony, Anthony* v. *Anthony*, (1892) 1 Ch. 450; cf. *S. C.*, (1893) 3 Ch. 498.

(*k*) *Re Bowerman*, (1908) 2 Ch. 340.

be made to the text books dealing with the duties of executors and administrators with regard to these matters.

What will amount to sufficient indication of intention.

ii.—Contrary Intention.—The Acts do not prescribe any particular mode of signifying contrary intention so as to exclude the operation of the present rule. The intention must be collected from the will or other document taken as a whole; and for this purpose the manner in which the mortgaged estate is disposed of is material.

Settlement.

Limitations in strict settlement *per se* are not sufficient (*l*).

Devise on trust for sale.

In one case (*m*) where lands subject to a mortgage were devised on trust for sale, the Court laid stress on the fact that the proceeds of sale were disposed of in detail after payment of costs, but not alluding to the mortgage, and accordingly held that the mortgaged estate must be exonerated out of the personalty.

Net proceeds.

A direction to pay all debts out of net proceeds of sale of real and personal estate does not show a contrary intention within the meaning of these Acts (*n*). "Net" is to be construed as though it meant "after payment of mortgages out of the realty" (*o*).

Heritable bond.

A Scotch heritable bond was held, under Locke King's Act, to be included in a direction to pay all just debts (*p*). But it was also held that a direction to pay "debts" included "mortgage debts" within the meaning of that Act (*q*).

Meaning of "debts."

By the Act of 1867 (*r*) the word "debts" does not include mortgage debts, unless there are express words showing an intention that it should do so, and this applies to a direction to pay debts out of real estate as well as out of personalty (*s*).

Direction to pay debts out of personalty in exoneration of realty.

A direction to pay all debts and funeral expenses out of the personalty in "exoneration" of the real estate is not sufficient. There must be words referring to mortgage debts either expressly (*t*) or by necessary implication.

(*l*) *Pembrooke* v. *Friend*, 1 J. & H. 134; *Coote* v. *Lowndes*, L. R. 10 Eq. 376.

(*m*) *Eno* v. *Tatham*, 3 De G. J. & S. 443.

(*n*) *Gall* v. *Fenwick*, 43 L. J. Ch. 178; *Elliott* v. *Dearsley*, 16 Ch. D. 322, C. A.

(*o*) *Re Boards, Knight* v. *Knight*, (1895) 1 Ch. 499.

(*p*) *Maxwell* v. *Maxwell*, L. R. 4 H. L. 506. But see *Smith* v. *Moreton*, 37 L. J. Ch. 6.

(*q*) *Woolstencroft* v. *Woolstencroft*, 2 De G. F. & J. 347; *Rowson* v. *Harrison*, 31 Beav. 207; *Brownson* v. *Lawrance*, L. R. 6 Eq. 1. See *Sackville* v. *Smyth*, L. R. 17 Eq. 153.

(*r*) 30 & 31 Vict. c. 69, *ante*, p. 794.

(*s*) *Re Newmarch, Newmarch* v. *Storr*, 9 Ch. D. 12, C. A.

(*t*) *Re Rossiter, Rossiter* v. *Ros-*

So a direction to pay debts "except charges and mortgage debts, if any, on property specifically devised" implies that other mortgage debts are to be paid out of residue and is a sufficient contrary intention within the Act (*u*).

It is not, however, necessary that the debts should be referred to as mortgage debts if they are specifically described and identified (*x*).

So where a testator devised his business premises to his son subject to and charged in exoneration of the rest of his estate with his business debts, and devised and bequeathed all the residue of his real and personal estate to trustees upon trust for sale and conversion, and for payment out of the proceeds of his debts other than those thereinbefore provided for, and subject thereto upon specified trusts, it was held that the will sufficiently indicated an intention that all the testator's private debts, including debts secured by mortgages on the property specifically devised to the son, should be paid out of the residuary estate in exoneration of such property (*y*).

Again, where a testator directed his private debts to be paid out of a specified fund, and after devising his real estate to certain persons and giving certain legacies, he bequeathed his residuary personalty to trustees, subject to the payment of his trade debts, it was held that there was a sufficient indication of contrary intention to entitle the devisees to have the real estate exonerated out of the residuary personalty from an equitable charge made by the testator to his bankers to secure an overdrawn trade account (*z*).

A direction to pay off any incumbrance on a particular property, which is not subject to any incumbrance at the testator's death, does not raise any implication of intention to exonerate out of his general personal estate other properties which are subject to incumbrances at his death (*a*).

Partial devise.

A specific devise of part of the mortgaged premises, leaving the other part to fall into the residue, does not show a contrary intention (*b*).

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siter, 13 Ch. D. 355. See *Nelson* v. *Page*, L. R. 7 Eq. 25; *Leonino* v. *Leonino*, 10 Ch. D. 460.

(*u*) *Re Valpy*, (1906) 1 Ch. 531.

(*x*) *Re Fleck, Colston* v. *Roberts*, 37 Ch. D. 677. See *Re Campbell*, (1893) 2 Ch. 206.

(*y*) *Re Nevill, Robinson* v. *Nevill*, W. N. (1890) 125; 62 L. T. 864.

(*z*) *Re Fleck, Colston* v. *Roberts*, 37 Ch. D. 677.

(*a*) *Re Bull, Catty* v. *Bull*, 49 L. T. 592.

(*b*) *Sackville* v. *Smyth*, L. R. 17 Eq. 153. And see *Gibbins* v. *Eyden*, L. R. 7 Eq. 371; *Lewis* v. *Lewis*, L. R. 13 Eq. 218.

Devise to A. "absolutely."

A specific devise to a person "absolutely" of land, part of the testator's realty which is subject to a mortgage, coupled with a direction to executors to pay legacies out of personalty, is not a sufficient indication of a "contrary intention" (*c*).

Charge on personalty and realty.

A charge of debts on personalty and on residuary realty, or a specified part of realty, or on residuary realty in aid of personalty, does not sufficiently indicate an intention to exonerate the mortgaged property (*d*).

Exoneration *pro tanto*.

Exoneration may be *pro tanto*. Thus where the contrary intention is shown by the substitution of a specific fund, it has been held that the Acts are excluded only to the extent of the substituted fund, so that if that fund proves insufficient, the right to exoneration is exhausted and the liability reverts to the mortgaged land (*e*).

Quære, whether the person to whom the substituted property is devised, subject to paying off the mortgage, can claim exoneration out of the general personal estate (*f*).

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SECTION III.

CONTRIBUTION BETWEEN SEVERAL OWNERS OF THE EQUITY OF REDEMPTION, AND THOSE CLAIMING UNDER THEM.

Statement of rule.

Where several estates subject to the same mortgage either originally belong to, or subsequently become the property of different owners, and one of such owners pays off the debt, he has the right to call upon the owners of the other estates to contribute rateably to the payment of the debt, according to a valuation of the several estates taking into account any other incumbrances affecting them respectively (*g*). This rule will apply in cases where the mortgaged estates of a deceased person

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(*c*) *Re Smith, Hannington* v. *True*, 33 Ch. D. 195, dissenting from *Brownson* v. *Lawrance*, L. R. 6 Eq. 1.

(*d*) *Lewis* v. *Lewis, sup.; Sackville* v. *Smyth, sup.; Re Newmarch, Newmarch* v. *Storr*, 9 Ch. D. 12; *Re Boards, Knight* v. *Knight*, (1895) 1 Ch. 499.

(*e*) Per Kindersley, V.-C., in *Rodhouse* v. *Mold*, 35 L. J. Ch. 67; *Re Birch*, (1909) 1 Ch. 787. But Romilly, M.R., seems to have been of a contrary opinion in *Allen* v. *Allen*, 30 Beav. 403.

(*f*) *Re Birch, sup.*

(*g*) *Aldrich* v. *Cooper*, 8 Ves. 390; *Clarke* v. *Brereton*, 1 Jo. 165; *Johnson* v. *Child*, 4 Ha. 87.

are primarily liable to satisfy the debt under Locke King's Act and the amending Acts, and also in cases not within those Acts, where the personalty of the deceased mortgagor is not sufficient to pay the debt in full.

Paramount charge.

Where the common incumbrance is a debt of the grantor himself, and not a charge paramount to his own title, there is no contribution. So the assignee of leaseholds, mortgaged by the assignor, is not liable to contribute to the payment of the debt which the executors of the assignor have paid (*h*).

Devise of general estates to different persons.

Where different estates in mortgage are devised to different persons, each devisee, either primarily, or on a deficiency of assets, takes his estate *cum onere* (*i*). But the rule is otherwise where all the estates were by the will charged with the payment of debts. So, in *Carter* v. *Barnardiston* (*k*), it was held that if one seised of Whiteacre and Blackacre mortgage the former, and then by his will devise Whiteacre to A., and Blackacre to B., the devisee of the former shall compel the latter to contribute.

On the like principle, if several estates are comprised in the same mortgage, and are devised to several persons, they must all contribute; so also if the estates in mortgage were freehold and copyhold respectively, and descended to different heirs (*l*).

Devise of several estate to same person.

The principle of contribution does not apply where several estates, subject to a mortgage, are devised to the same person so as to entitle the person claiming one of the estates under him to throw the mortgage debt, or any part of it, upon the other estates which have been devised to or devolved upon different persons. The question whether he is so entitled must depend not upon any right arising under the will creating the title of the original devisee, but upon the right, if any there be, arising upon the instrument creating the title of the person claiming under the devisee (*m*).

Common demand.

Before a case of contribution can arise, the several estates must have been liable to one common demand. Thus, where A., the first mortgagee of Whiteacre, and B., the first mortgagee of

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(*h*) *Re Darby's Estate*, (1907) 2 Ch. 465.

(*i*) *Halliwell* v. *Tanner*, 1 R. & My. 633; *Symons* v. *James*, 2 Y. & C. C. C. 301.

(*k*) 1 P. Wms. 506. See *Irvine* v. *Ironmonger*, 2 R. & My. 531; *Middleton* v. *Middleton*, 15 Beav. 450; *Barnes* v. *Racster*, 1 Y. & C. C. C. 401.

(*l*) *Aldrich* v. *Cooper*, 8 Ves. 390.

(*m*) *Stronge* v. *Hawkes*, 4 De G. & J. 632, at p. 654.

Blackacre, joined in a mortgage of both estates and consented to give to the subsequent mortgagee priority over their respective charges; and the lands were subsequently sold, and the subsequent mortgage was paid off out of the proceeds of sale of both properties; the surplus proceeds of sale of Whiteacre were not sufficient to pay off the mortgage upon it; it was held that A. was not entitled to contribution against B., there not having been any common liability to pay a common demand (*n*).

Common fund.

Moreover, the several estates must be liable equally, and not one as surety or collateral security for the other, and be a common fund (*o*).

Thus, where under Locke King's Act (*p*) land is specifically charged with a debt, which is also generally charged on shares of a company by a provision of the Act of Settlement, there is no contribution, because there is no common fund (*q*).

But a mortgage described as a collateral security is not necessarily entitled to exoneration. Collateral is not equivalent to secondary (*r*).

In a case arising under the former law before Locke King's Act, where a person possessed of several leasehold estates mortgaged one of them, and then, by his will, bequeathed them separately to different parties, and directed his debts to be paid out of his residuary personal estate, and such residuary estate proved insufficient for the purpose, it was held that the legatee of the mortgaged estate must take it *cum onere*, and could not call on the other legatees to contribute (*s*).

But where several estates subject to distinct mortgages were specifically devised to different persons, and the testator directed that the mortgages should be discharged out of the personal estate, so that the devisees might hold the estates freed therefrom, and there proved to be a deficiency of personal assets for payment of debts, a decree was made that the mortgage and other specialty debts should first be paid out of the personal assets *pro ratâ*, that the residue of the mortgage debts should be borne by the respective estates on which they were charged, and that the deficiency of the other specialty debts, and the

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(*n*) *Re Keily*, 9 Ir. Ch. R. 87.

(*o*) *Marq. of Bute* v. *Cunynghame*, 2 Russ. 275, 299; *Averall* v. *Wade*, Ll. & G. t. Sug. 252; *Re Dunlop*, 21 Ch. D. 592, C. A.

(*p*) 17 & 18 Vict. c. 113.

(*q*) *Re Dunlop*, *sup.*

(*r*) *Re Athill*, 16 Ch. D. 211.

(*s*) *Halliwell* v. *Tanner*, 1 R. & My. 633; *Emuss* v. *Smith*, 2 De G. & S. 736.

simple contract debts, should be borne by the several devised estates, and the specific legacies, *pro ratâ* (*t*).

A testator devised real estate subject to a trust to raise portions. His general personal estate was insufficient for payment of debts, and the real estate and specifically bequeathed personal estate had to contribute. Held, that as between the portioners and persons entitled to the real estate, the former were not bound to contribute (*u*).

In a case where a testator devised his freehold and copyhold and leasehold estates to his seven children in equal shares, charged with payment of his debts, and bequeathed his personal estate to A., exonerated from his debts, and declared that the freeholds and copyholds should be the primary fund, and the leaseholds the secondary fund, for payment of the debts, and one of the children died in his lifetime, it was held that one-seventh share of the freeholds and other estates, after payment of the debts charged thereon, lapsed to the heir-at-law and next of kin respectively, and that the devisees of the other six shares were not entitled to have the lapsed share applied in exoneration of the devised shares (*x*).

Interest.

Where contribution is ordered between different funds, each of them ought to be placed in the same position as if it had contributed when it ought to have done so, and therefore the fund must contribute interest (*y*).

(*t*) *Symons* v. *James*, 2 Y. & C. C. C. 301.

(*u*) *Re Saunders-Davies*, 34 Ch. D. 482.

(*x*) *Fisher* v. *Fisher*, 2 Keen, 610; the marginal note is inaccurate.

(*y*) *Ashworth* v. *Munn*, 34 Ch. D. 391.

CHAPTER XLI.

MARSHALLING OF MORTGAGED ASSETS.

Statement of the doctrine.

i.—**Nature and Effect of the Doctrine of Marshalling as applied to Mortgages.**—The general rule of equity is, that a person having two funds to which he may resort, shall not disappoint another person who can resort to one only of the funds (*a*). If, therefore, a creditor has a claim upon two funds, and another creditor has a claim upon one only of those funds, the Court will marshal the funds, without regard to the interests of the debtor, so as to satisfy the claim of the creditor having both funds, out of that fund which, paying him, will leave the other fund for the other creditor (*b*). The doctrine of marshalling applies not only in the administration of assets of a deceased person, but also in the appropriation of particular funds at any time, either during the life or after the death of a debtor, in satisfaction of claims arising under successive charges or interests to which the several funds are subject.

Application of the doctrine to cases of mortgage.

The doctrine of marshalling, in relation to mortgages, results in the general rule that where an owner of several properties has mortgaged them to the same person and afterwards deals separately with the equity of redemption in one or more of those properties either by way of mortgage or otherwise, the person or persons interested in the equities of redemption so dealt with are entitled, as against the mortgagor, to require that the first mortgage shall be paid off in the first place out of the property not so dealt with, or, if that mortgage is paid off out of the property in which they are so interested, to stand *pro tanto* in the place of the first mortgagee in regard to the property which has not been resorted to for satisfying his security.

Rights of first mortgagee not

In applying the doctrine of marshalling, the Court will not restrain a prior mortgagee from satisfying his debt out of avail-

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(*a*) *Aldrich* v. *Cooper*, 8 Ves. 382, 891. And see notes to *S. C.* in Wh. & Tud. L. C. Eq. (7th ed.) vol. i. 36, ii. pp. 109 *et seq.*

(*b*) *Att.-Gen.* v. *Tindall*, Amb. 619.

able property comprised in his mortgage, which is subject to a subsequent incumbrance, merely because his security comprises other property which is not so subject; he has a right to take the money that is realised by any of his securities which comes first to hand (*c*).

interfered with.

The right of marshalling has never been held to prevent a prior mortgagee from realising his securities in such manner and order as he thinks fit (*d*).

Right of *puisne* assignee where first mortgagee realizes all his securities.

If, however, a prior mortgagee realizes several properties comprised in his security he will not be allowed to satisfy his debt out of one of those properties over which another person has a claim as mortgagee or otherwise, in exoneration of the proceeds of sale of other properties which are not subject to such a claim. So a second mortgagee will be entitled to the extent of the value comprised in his security to have the balance of the moneys received by the first mortgagee in respect of all the securities realized by him, after satisfying his mortgage debt, applied in or towards satisfaction of the second mortgage, and the first mortgagee will be deemed to be a trustee of such balance for the second mortgagee, and if he refuses to account for and apply the moneys received by him on that footing, he will be liable to the costs of proceedings to compel him to do so (*e*).

Where first mortgagee realizes security which is subject to second mortgage.

If the prior mortgagee of several properties realizes property which is subject to a subsequent incumbrance, instead of property which is not so subject, and satisfies his debt out of the proceeds of the property realized, the subsequent incumbrancer will be entitled to stand in the place of the prior mortgagee as regards the property to which the latter has not resorted, so that the payment of both claims may as far as possible be worked out (*f*). This rule will apply where the only one of two funds to which a subsequent incumbrancer could resort has been applied in payment of the prior mortgage by order of the Court for convenience of administration (*g*).

So, where an executor was mortgagee of real estate of the testator, and also a legatee under the will, it was held that he was not bound to satisfy the mortgage debt out of the first

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(*c*) *Wallis* v. *Woodyear*, 2 Jur. N. S. 179; but see *Webb* v. *Smith*, 30 Ch. D. 192, 202.

(*d*) *Manks* v. *Whiteley*, (1911) 2 Ch. 448, per Parker, J.

(*e*) *South* v. *Bloxom*, 2 H. & M. 457.

(*f*) *Trimmer* v. *Bayne*, 9 Ves. 209.

(*g*) *Gwynne* v. *Edwards*, 2 Russ. 289, n.

assets which came into his hands on the ground that on his so doing the right of marshalling would arise so as to entitle the other legatees to go *pro tanto* against the real estate (*h*).

Marshalling in case of extent by the Crown.

This equity has been applied in favour of a mortgagee whose interest in an estate was affected by an extent of the Crown; and he was held entitled to stand in the place of the Crown as to those securities which he could not affect directly because the Crown had affected them (*i*).

Distress for rent.

Where a mortgagee of chattels has left the mortgagor in possession without fraud, and the landlord distrains those, as well as other chattels belonging to the mortgagor absolutely, and sells some of each kind, and the mortgagor then becomes bankrupt, the mortgagee is entitled to have the chattels marshalled, and to throw the distress primarily upon the goods not included in his mortgage (*k*).

Paraphernalia of widow.

So, in a case under the old law, whereby personalty was primarily liable for payment of a mortgage debt in exoneration of mortgaged realty, it was said that if the mortgagee took the paraphernalia of a widow in satisfaction of his debt she would be entitled in equity to stand in place of the mortgagee, and to take as much out of the realty as should be equivalent to the value of the paraphernalia taken by the mortgagee (*l*).

This general rule may be enforced where the equities of redemption subject to the first mortgage have descended upon different persons (*m*).

Bankruptcy does not prevent marshalling.

The bankruptcy of the debtor will not prevent the application of the rule, for the trustee in the bankruptcy stands in the place of the bankrupt. So, where a trader mortgaged certain real estate and policies of assurance to one person, and afterwards mortgaged the estate alone to another person, and subsequently became bankrupt, it was held that the second mortgagee was entitled to have the policy moneys applied in the first instance in payment of the debt due to the first mortgagee (*n*).

(*h*) *Binns* v. *Nichols*, L. R. 2 Eq. 256.

(*i*) *Sagitary* v. *Hyde*, 1 Vern. 455.

(*k*) *Exp. Stephenson*, De G. 586, 589. See *Broadbent* v. *Barlow*, 3 De G. F. & J. 570.

(*l*) *Tipping* v. *Tipping*, 1 P. Wms. 729.

(*m*) *Lanoy* v. *Duke of Athol*, 2 Atk. 444. See *Re Jones, Farrington* v. *Forester*, (1893) 2 Ch. 461.

(*n*) *Baldwin* v. *Belcher*, 3 Dr. & War. 173. See also *Hughes* v. *Williams*, 3 Mac. & G. 683, 690; *Gibson* v. *Seagrim*, 20 Beav. 614; *Heyman* v. *Dubois*, L. R. 13 Eq. 158; *Re Burge*, (1912) 1 K. B. 393.

Husband and wife.

Where a husband and wife together mortgaged freeholds and copyholds belonging to the wife, the mortgagee was held to be entitled, after the husband's death, to marshal as against the wife surviving, and to require that the first mortgage should be paid off primarily out of the copyholds so far as they would extend (*o*).

Fee simple reduced to life estate.

It is not clear whether the principle of marshalling applies between two interests, where the owner of a fee simple subject to a mortgage reduces his interest to a life estate, and then mortgages his life estate (*p*).

Effect of restraint on anticipation.

It would seem that the doctrine of marshalling will apply notwithstanding that the result will be to defeat a restraint on anticipation. So, where a woman entitled under a will to a life interest without power of anticipation in one fund, and to an unrestricted life interest in another fund, during widowhood mortgaged her life interest and certain policies of assurance on her life to secure an advance; and, having married again, she charged her life interests in favour of a subsequent mortgagee, it was held that the doctrine of marshalling applied in favour of the second mortgagee, and that the interest on the first mortgage must be primarily kept down out of the income, which was subject to the restraint on anticipation (*q*).

Covenant against incumbrances.

The right of a subsequent incumbrancer to insist, under the doctrine of marshalling, that the debt of the first mortgagee shall be satisfied out of the property not subject to the *puisne* incumbrance, may be enforced though the instrument creating the second charge does not contain any covenant or statement that the property comprised therein is free from incumbrances (*r*); but a covenant or statement to that effect may strengthen the position of the *puisne* incumbrancer by working in aid, as against the mortgagor, the principle of equity that what has been agreed upon, and ought to be done, shall so far as possible be specifically enforced (*s*).

So, where a mortgagor settled part of the mortgaged lands and other lands not in mortgage, and the settlement did not recite that any incumbrances existed, but contained a covenant against incumbrances, it was held that as between the tenant

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(*o*) *Tidd* v. *Lister*, 3 De G. M. & G. 857.

(*p*) *Dolphin* v. *Aylward*, L. R. 4 H. L. 486, 502.

(*q*) *Re Loder*, 56 L. J. Ch. 230.

(*r*) *Hales* v. *Cox*, 32 Beav. 118; *Mallott* v. *Wilson*, 72 L. J. Ch. 664.

(*s*) *Averall* v. *Wade*, Ll. & G. t. Sug. 252, at p. 260.

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in tail under the settlement and the settlor the settled estates must be deemed to be exonerated from the mortgage so as to throw it wholly on the unsettled estates, and that a subsequent judgment creditor and the assignees in insolvency of the settlor were subject to the same equities as the settlor himself (*t*). But the principle of this decision would clearly not be applied to the prejudice of a subsequent *boná fide* incumbrancer or purchaser without notice (*u*).

Erroneous recital that debts are paid.

Where a person was owner of two estates charged with debts, and mortgaged one of them, and the mortgage deed recited (though erroneously) that the debts were paid, and contained a covenant against incumbrances, it was held that the mortgagor was bound to indemnify the mortgaged estate from such debts out of the other estate; but it was said that whether the other estate would be charged with such debts and bound by such covenant in the hands of a subsequent mortgagee thereof would depend upon many considerations of notice or otherwise (*x*).

But in such a case a covenant against incumbrances contained in a mortgage by way of appointment will not be enforceable by a subsequent mortgagee so as to entitle him to have the estate comprised in his mortgage exonerated from the charge of debts as against subsequent mortgagees claiming under the same powers (*y*).

Claim to marshal need not be pleaded.

The right to marshal may be claimed at the hearing of the action, though not expressly raised by the pleadings. If the Court sees at any period that a creditor, having only one fund, will be deprived of his debt by a creditor who has also another fund, going against the former fund, the Court will of itself, without being called upon, direct the assets to be marshalled (*z*).

Rule between first mortgagee of several estates and *puisne* mortgagee of one estate.

ii. In Favour of what Persons the Right of Marshalling arises.—The rule as between one mortgagee of several estates and a subsequent mortgagee of one of them is thus laid down by Lord Hardwicke, C., in *Lanoy* v. *Duke of Athol* (*a*):—

(*t*) *Hughes* v. *Williams*, 3 Mac. & G. 683; *Chappell* v. *Rees*, 1 De G. M. & G. 393.

(*u*) *Barnes* v. *Racster*, 1 Y. & C. C. C. 401; *Baglioni* v. *Cavalli*, 83 L. T. 500. See *Tighe* v. *Dolphin*, (1906) 1 Ir. R. 305, *post*, p. 813.

(*x*) *Stronge* v. *Hawkes*, 4 De G. & J. 632, 651.

(*y*) *Ibid.*

(*z*) *Gibbs* v. *Ougier*, 12 Ves. 413, 416.

(*a*) 2 Atk. 444.

Suppose a person who has two real estates, mortgages both of them to one person, and afterwards only one estate to a second mortgagee who had no notice of the first, the Courts, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage in order to make room for the second mortgagee, even though the estates descended to two different persons.

Notice immaterial.

It is to be observed, however, with regard to this statement of the rule, that it is now immaterial whether the second mortgagee had notice of the first mortgage or not (*b*).

Extent of the rule.

It may also be remarked that Sir E. Kay, L.J., intimated that Lord Hardwicke, in saying that "the Court would direct the mortgagee to take his satisfaction out of that estate only not in mortgage to the second mortgagee," must be taken to have meant merely that the second mortgagee could, as against the *mortgagor* and those claiming under him, compel the payment of the first mortgage out of the estate on which he had no charge, according to the ordinary doctrine of marshalling (*c*).

First charges not simultaneous.

The right to marshal may arise though the two estates, subject to the first mortgage, do not become so subject at the same time, as, for instance, where lands not comprised in the original mortgage are afterwards mortgaged by way of collateral security for the same debt (*d*).

Rule applies in favour of persons having charges other than by way of mortgage.

The doctrine of marshalling is applied in favour of persons having charges arising otherwise than by way of subsequent mortgage upon one only of the mortgaged properties. So, where a mortgage was made of two estates, and one of them was subsequently settled so as to be subject to a portion, it was held that the person entitled to the portion had the right to require that the estate which was not subject to the portion should be first resorted to in or towards satisfaction of the mortgage (*e*). So also an annuitant or rent chargee is entitled to marshal (*ee*).

Vendor's lien.

So, also, where an advance was made on the security of certain deposited goods, and of a bill of lading of other goods sent to

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(*b*) See *Baldwin* v. *Belcher*, 3 Dr. & War. 176; *Hughes* v. *Williams*, 3 Mac. & G. 683; *Tidd* v. *Lister*, 3 De G. M. & G. 857; *Heyman* v. *Dubois*, L. R. 13 Eq. 158.

(*c*) *Flint* v. *Howard*, (1893) 2 Ch. 54, at p. 73. See *Baglioni* v. *Cavalli*, 83 L. T. 500.

(*d*) *Gwynne* v. *Edwards*, 2 Russ. 289.

(*e*) *Lord Rancliffe* v. *Parkyns*, 6 Dowl. 216.

(*ee*) *Re Fry*, (1912) 2 Ch. 86.

the borrower by the unpaid vendor of the goods comprised therein, it was held that the vendor could compel the depositee, who had sold all the goods comprised in his securities, to satisfy his claim out of proceeds of sale of the goods not comprised in the bill of lading (*f*).

Volunteers.

Marshalling may be enforced in favour of a volunteer as against a subsequent incumbrancer, but only it seems where the incumbrance is made subject to the rights of the volunteer (*g*).

Where a man made a settlement of real estate and covenanted for quiet enjoyment, and then mortgaged the settled and other unsettled estates, the persons claiming under the settlement, though voluntary, were entitled to throw the mortgage on the unsettled estates (*h*).

The principle of marshalling has been held not to apply as between mere volunteers (*i*).

Surety.

A surety is entitled to the benefit of marshalling (*k*).

Where one of the securities is impeached.

Where a person deposited with his bankers, to secure the balance of his current account, an annuity deed together with documents of title relating to other property, it was held, in a suit to set aside the annuity deed, that the plaintiff might require the bankers to first apply in payment of their debt the securities in which the plaintiff had no interest so as to liberate the annuity deed (*l*). In this case the Court did restrain the creditors from dealing with one of their securities pending the result of the suit, but this was done on the express ground that no injustice would ultimately follow from such restraint.

Rule applies where first charge is not a mortgage.

The doctrine also applies where several properties are subject to a charge arising otherwise than by way of mortgage, in favour of a person having a subsequent charge or claim upon one only of such properties.

Portions.

The rule was applied in favour of portions charged on freehold and leasehold estate, subject to the jointure of a wife by settlement, as against the wife, who had the collateral security of a covenant for her jointure, though the copyhold and personal

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(*f*) *Re Westzinthus*, 5 B. & Ad. 817.

(*g*) *Aldridge* v. *Forbes*, 4 Jur. 20; explained *Re Lysaght's Estate*, (1903) 1 Ir. R. 235; *post*, p. 813.

(*h*) *Hughes* v. *Williams*, 3 Mac. & G. 684; *Hales* v. *Cox*, 32 Beav. 118; *Anstey* v. *Newman*, 39 L. J. Ch. 769; *Mallott* v. *Wilson*, 72 L. J. Ch. 664. But see *Ker* v. *Ker*, Ir. R. 4 Eq. 15; *Re Lysaght*, *sup.*

(*i*) *Boazman* v. *Johnston*, 3 Sim. 377. But see *Lomas* v. *Wright*, 2 My. & K. 769.

(*k*) *Post*, p. 814.

(*l*) *Duncombe* v. *Davis*, 1 Ha. 184, 195. See *Re Burge*, (1912) 1 K. B. 393.

estate, which were affected by the covenant, were bequeathed to her by the settlor absolutely (*m*).

General charge of debts.

Where debts are charged generally on the residuary estate, and the devisee-executor mortgages part of the residuary estate, the mortgagee is entitled to have the assets marshalled so as to throw the debts on the residuary estate not comprised in the mortgage (*n*).

Charge of legacies.

Where legacies are charged on several estates, one of which is mortgaged subsequently, the mortgagee is entitled to have the legacies raised out of the other estates (*o*). This at least is so where the mortgage contains a covenant against incumbrances (*p*).

So, if a devisee of two estates charged with legacies mortgages them separately, and the proceeds of sale of one estate are insufficient to satisfy the legacies and the mortgage debt, the mortgagee may require the other mortgaged estate to be first resorted to for payment of the legacies, so as to enable his own mortgage to be satisfied (*q*).

When legatees may marshal.

The rule is further exemplified by the case of a charge of debts on real estate by will, with a gift of pecuniary legacies, in which event, if a creditor exhaust the personalty, the legatee will to that amount be entitled to come on the land (*r*), even as against specific devisees (*s*). So in the case of two legacies, one merely pecuniary, and the other charged on land, there is the like marshalling (*t*).

In cases not falling within Locke King's Act (*u*), so that the personalty is primarily liable to the payment of mortgage debts, the principle of marshalling is applied in favour of creditors (*x*), and of legatees, whether specific (*y*), or pecuniary (*z*) Specific devisees of real estate by the terms of the will freed and

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(*m*) *Lanoy* v. *Duke of Athol*, 2 Atk. 44. And see *Leigh* v. *Leigh*, 15 Sim. 135.

(*n*) *Haynes* v. *Forshaw*, 11 Ha. 93.

(*o*) *Finch* v. *Shaw*, 5 H. L. C. 905; 2 Jur. N. S. 25.

(*p*) *McCarthy* v. *M'Cartie*, (1904) 1 Ir. R. 100.

(*q*) *Exp. Hartley*, 2 M. & A. 496.

(*r*) Amb. 129; *Haslewood* v. *Pope*, 3 P. Wms. 324, 4th point.

(*s*) *Re Roberts*, *Roberts* v. *Roberts*, (1902) 2 Ch. 834.

(*t*) *Hanby* v. *Roberts*, Amb. 127; *Masters* v. *Masters*, 1 P. Wms. 421; *Bligh* v. *Earl of Darnley*, 2 P. Wms. 619.

(*u*) See *ante*, pp. 792 *et seq*.

(*x*) *Bartholomew* v. *May*, 1 Atk. 487; *Lomas* v. *Wright*, 2 My. & K. 769.

(*y*) *O'Neal* v. *Mead*, 1 P. Wms. 693; but see *Re Butler*, (1894) 3 Ch. 250.

(*z*) *Davis* v. *Gardener*, 2 P. Wms. 190; *Rider* v. *Wager*, 2 P. Wms. 335; *Wythe* v. *Henneker*, 2 My. & K. 635; unless the will otherwise directs.

discharged from the payment of mortgages thereon, are not entitled to have the mortgages paid off out of the residuary personal estate until the pecuniary legacies have been satisfied in full (*a*). If the specific devisees have been so paid, the Court will marshal in favour of the pecuniary legatees (*b*).

Lien.

So, where a contract for purchase of real estate is completed after the purchaser's death, and the purchase-money has been paid out of his general estate, a pecuniary legatee will be entitled to marshal against the purchased estate, there being no distinction between a mortgage and the vendor's lien in this respect (*c*).

Mortgagee of voidable policy of life assurance.

The doctrine of marshalling will not be extended so as to entitle a life assurance society to require the mortgagee of a policy which is in terms to be void on suicide of the assured, except to the extent of an assignee's interest, to throw the mortgage debt primarily upon other property included in his security, nor to have it apportioned between the policy moneys and the other property (*d*).

Mortgage of policy to assurance company.

So, also, where an assurance company advanced money on the security of a mortgage of certain real estates and of a policy on the life of the mortgagor effected in its own office in similar terms, and the assured committed suicide, it was held that the company stood in no better position than if the policy had been mortgaged to a third person, and could not be allowed to satisfy their debt out of the real estates to the prejudice of the persons interested therein, and accordingly, the policy money being sufficient to satisfy the debt, the real estates were ordered to be reconveyed free from the mortgage (*e*).

Doctrine not applied to prejudice of third parties.

iii.—Marshalling not applied to Prejudice of Third Parties.—The doctrine of marshalling will not be applied to the prejudice of third parties, that is, against any one except the mortgagor and his legal representatives, claiming as volunteers under him. It is not enforced against a mortgagee or purchaser of the other estate (*f*).

(*a*) *Lutkins* v. *Leigh*, Ca. t. Talb. 53; *Re Smith, Smith* v. *Smith*, (1899) 1 Ch. 365.

(*b*) *Ibid.*

(*c*) *Sproul* v. *Prior*, 8 Sim. 189; *Birds* v. *Askey*, 24 Beav. 618; *Lord Lilford* v. *Powys-Keck*, L. R. 1 Eq. 347.

(*d*) *Solicitors and General Life Assurance Soc.* v. *Lamb*, 2 De G. J. & S. 251; *City Bank* v. *Sovereign Life Assurance Co.*, 60 L. T. 565.

(*e*) *White* v. *British Empire Mutual Life Assurance Co.*, L. R. 7 Eq. 394.

(*f*) Per Kay, L.J., in *Flint* v.

Subsequent mortgagee.

Thus, the Court will not marshal in favour of a second mortgagee as against a subsequent mortgagee, and, accordingly, where there is a first mortgage over two estates, and then a mortgage on one of the estates, and then a mortgage on the other or on both the estates, this right of marshalling will not be exercised in favour of the second incumbrancer against the third, though with notice of the second incumbrance (*g*). In such case the first mortgage will be apportioned rateably between the two estates (*h*); and yet the second incumbrancer, or even a third incumbrancer on the one estate (if lending his money without notice), can oust the *puisne* incumbrancer on the other estate from his security, by subsequently buying in the first mortgage, which covers both estates (*i*).

Marshalling between settled and unsettled estates.

Where the owner of two estates subject to a mortgage settled one of them on his daughter's marriage, there being no covenant against incumbrances in the settlement but a verbal representation that the estate was free from incumbrances, and the other estate passed to a purchaser for value with notice of the settlement but not of the verbal representation, it was held that the purchased estate was bound to indemnify the settled estate against the mortgage debt (*k*).

Volunteers.

The doctrine will not apply in favour of a subsequent mortgagee to the prejudice of volunteers where one of the estates has been conveyed by way of voluntary settlement (*l*). But volunteers have no right to marshal to the prejudice of a prior settlement (*m*).

If, however, a third mortgage is expressed to be made subject to and after payment of the prior mortgages, the second mortgagee will be entitled to marshal against the third (*n*).

Howard, (1893) 2 Ch. 54, at p. 73, C. A. See *Baglioni* v. *Cavalli*, 83 L. T. 500.

(*g*) See *inf.*, p. 814.

(*h*) *Barnes* v. *Racster*, 1 Y. & C. Ex. 401; *Bugden* v. *Bignold*, 2 Y. & C. Ex. 377; *Re Mower's Trusts*, L. R. 8 Eq. 110; *Trumper* v. *Trumper*, L. R. 8 Ch. 870; *Re Dunlop*, *Dunlop* v. *Dunlop*, 21 Ch. D. 583, C. A.; *Flint* v. *Howard*, (1893) 2 Ch. 54, C. A.

(*i*) See *Bovey* v. *Skipwith*, 1 Ch. Ca. 201.

(*k*) *Tighe* v. *Dolphin*, (1906) 1 Ir. R. 305, following *Averall* v. *Wade*, Ll. & G. t. Sug. 252. See *Hamilton* v. *Royse*, 2 Sch. & L. 315; *Goring* v. *Farrall*, Beat. 472; *Lawrance* v. *Galsworthy*, 3 Jur. N. S. 1049; *Stronge* v. *Hawkes*, 4 De G. & J. 632, 651; *Re Scott's Estate*, 14 Ir. Ch. R. 63; *Chappell* v. *Rees*, 1 De G. M. & G. 393; 16 Jur. 415.

(*l*) *Dolphin* v. *Aylward*, L. R. 4 H. L. 502. See *Re Lysaght's Estate*, (1903) 1 Ir. R. 235.

(*m*) *Anstey* v. *Newman*, 39 L. J. Ch. 769.

(*n*) *Re Mower's Trusts*, L. R. 8 Eq. 110.

Where one has a mortgage upon Blackacre and a collateral charge upon Blackacre and Whiteacre, and takes a subsequent mortgage on Blackacre for a further sum, he can exhaust Whiteacre in satisfying his charge, leaving Blackacre clear for his further mortgage, and cannot be compelled by a *puisne* incumbrancer on Whiteacre to marshal his securities, notwithstanding his further mortgage contains a covenant against incumbrances, except the first mortgage (*o*).

Surety.

A surety is entitled to the benefit of marshalling, but he has no equity to prevent marshalling (*p*).

Two funds, one subject to lien, the other not.

On the principle that assets shall not be marshalled where by so doing another person's rights would be prejudiced, the doctrine of marshalling does not apply unless the prior creditor has equal rights over both properties. So where creditors have a lien upon one fund, and merely a right of set off against another, a person having a subsequent charge on the former fund is not entitled to compel the creditors to retire from their higher right by virtue of their prior lien, and to resort to the fund in respect of which they have only a right of set off (*q*).

Rights of several mortgagees of distinct funds subject to prior mortgage.

Where Blackacre and Whiteacre are mortgaged together to A., and subsequently Blackacre is mortgaged to B., and Whiteacre is mortgaged to C., there can be no such marshalling as shall prejudice either B. or C., but, in such a case, their rights are to require that A.'s debt shall be satisfied rateably out of the two estates so as to leave a proper proportion thereof respectively to satisfy the claims of B. and C., the ultimate surplus arising from both estates being payable to the mortgagor, or those claiming under him (*r*). Where the several equities of redemption become absolutely vested in different persons by purchase, devise, devolution, or otherwise, if one of such persons is compelled to satisfy the debt, he will be entitled to require the owner of the other estate to contribute rateably his proportion of the debt (*s*).

(*o*) *Re Roddy*, 11 Ir. Ch. R. 369.

(*p*) *South* v. *Bloxam*, 2 H. & M. 457; *Heyman* v. *Dubois*, L. R. 13 Eq. 159.

(*q*) *Webb* v. *Smith*, 30 Ch. D. 192, C. A.

(*r*) *Moxon* v. *Berkeley Building Soc.*, 59 L. J. Ch. 524; *Baglioni* v. *Cavalli*, 49 W. R. 236.

(*s*) See *Re Dunlop*, *Dunlop* v. *Dunlop*, 21 Ch. D. 583, C. A.

END OF VOLUME I.

MIDDLE TEMPLE

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